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In the Supreme Court of the United States

No. 280

INTERNATIONAL LONGSHOREMEN'S & WARE-
HOUSEMEN'S UNION AND INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S
UNION, LOCAL 16,

Petitioners,

v.

JUNEAU SPRUCE CORPORATION,

Respondent.

RESPONDENT'S BRIEF

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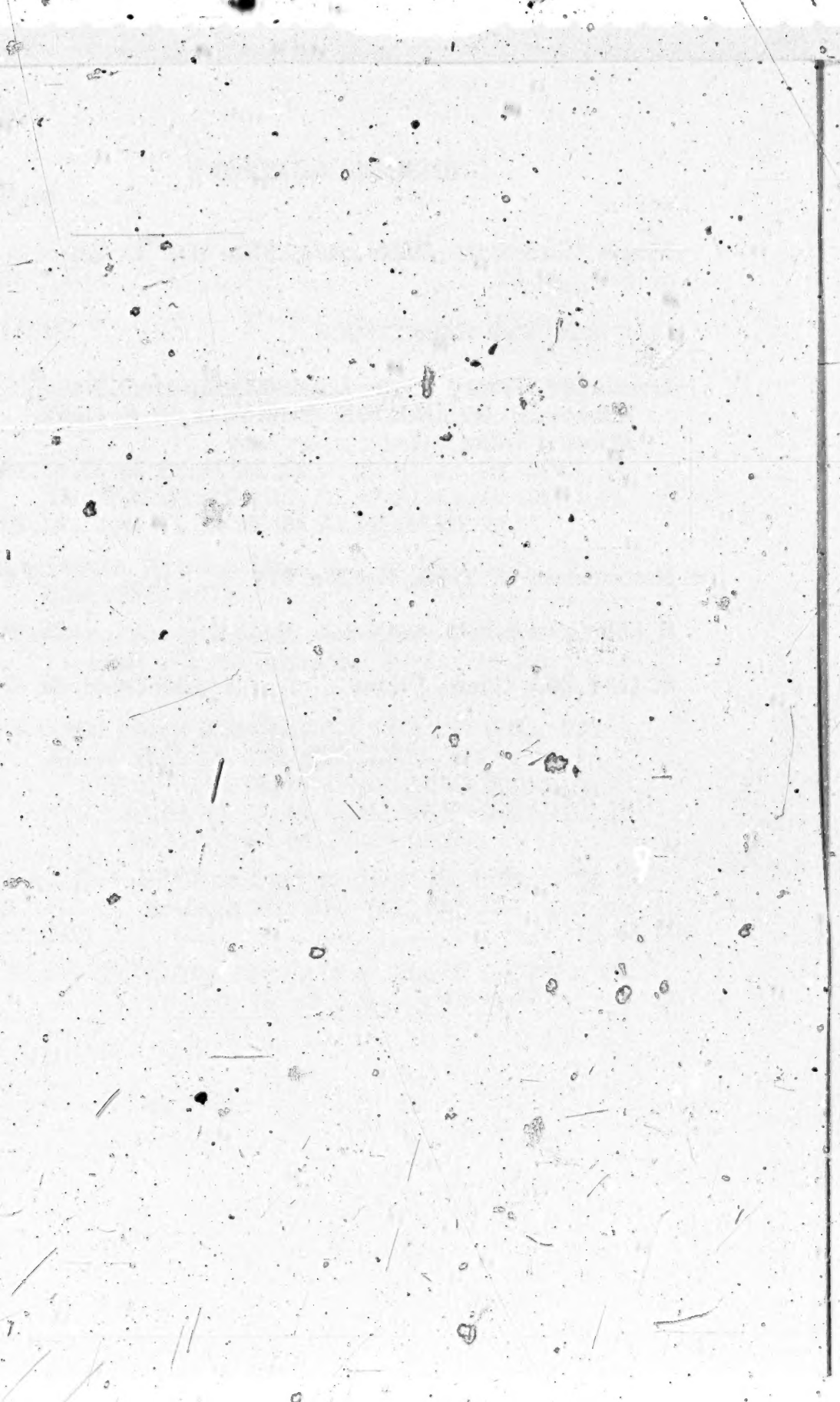
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OPINIONS BELOW

The opinion of the trial court overruling petitioners' demurrer, is reported in 83 F. Supp. 224. The opinion of the Court of Appeals is reported in 189 F. (2d) 177 (R. 1106).

QUESTIONS PRESENTED

1. Whether a right of action under Section 303(b) of the Act for the damages caused by the unlawful acts described in Section 303(a)(4) is dependent upon what

action may be taken by the National Labor Relations Board under Sections 8(b)(4)(D) and 10(k) of the Act.*

2. Whether the trial court erred in certain rulings on questions of jurisdiction, service of process and agency.

Petitioners do not question the propriety of such rulings if Section 301 of the Act was applicable to the trial court, and concede that the Section in question is applicable to "district courts of the United States." Accordingly this question, which is raised by petitioners' second specification of error, involves solution of the following questions:

a. Was the trial court a "district court of the United States" within the meaning of the Act?

b. If not, was Section 301 of the Act nevertheless applicable to the trial court in its capacity as "any other court having jurisdiction of the parties"?

c. If not, were the trial court's rulings nevertheless correct?

3. Whether the trial court should have instructed the jury on respondent's duty to bargain on petitioners' demands.

STATUTE INVOLVED

The statute upon which respondent predicated its action against petitioners is Section 303(a)(4) and (b)

*This was the sole question (divided into two parts), presented by petitioners as ground for granting the writ herein (Petition, p. 14).

of the Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136, 29 U.S.C. (III) §187(a)(4) and (b), 29 U.S.C.A. §187(a)(4) and (b), which states that:

"Sec. 303 (a). It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage, the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—"

* * * * *

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT OF THE CASE

Petitioners' statement of the case seems designed to convey the impression that the issue litigated in the trial court was whether the members of their union were entitled to load respondent's barges. Certainly some of petitioners' statements would have no purpose but to imply that their members were entitled to such work and that respondent acted arbitrarily in refusing their demands. Because accuracy is involved we take issue with petitioners concerning the evidence in this regard while not conceding in the least its materiality to the real issues involved. Neither the trial court nor the Court of Appeals considered that the issue was between two unions contesting for work, for it was undisputed that respondent had assigned the loading of its barges to its regular sawmill employees and that petitioners had not been certified by the National Labor Relations Board as the bargaining representative of any of respondent's employees. Thus the statute's requirements were deemed below to have been completely satisfied.

Moreover petitioners' statement of the case contains inaccurate and misleading statements and resolves disputed questions of fact in favor of petitioners, although the verdict was for respondent. It therefore seems necessary to set forth a correct statement of the facts which were conceded or which the jury might have found from the evidence.

Early in 1947 respondent purchased from Juneau Lumber Mills, Inc., a sawmill and other properties in

Alaska, and on May 2, 1947, commenced operation of the sawmill at Juneau, Alaska (R. 114, 123). During the early stages of its operation the bulk of its sales were made to the Corps of Engineers, U. S. A. Delivery of the lumber was at respondent's mill; the lumber was taken away by Engineer personnel (R. 154). Some lumber was also sold to customers who shipped by commercial steamer, and a small amount was sold and delivered to fishing boats and cannery tenders. In these instances the loading was done by longshoremen as employees of the owners of the vessels (R. 155, 169-179). Where respondent's vessels were loaded from its dock respondent uniformly used its regular sawmill employees in such loading (R. 176-179).

In September, 1947, the Corps of Engineers canceled its contract (R. 183) with respondent. Respondent then acquired barges and suitable tugs for the purpose of taking its lumber to ports in the United States and Canada (R. 184). Because of limited storage space at respondent's mill for normal commercial needs the barges were also to serve as auxiliary storage yards, and respondent's lumber was loaded in normal course by its employees. This work was intermittent and an integral part of the sawmill operations (R. 186, 254, 255).

The contract under which respondent acquired the properties in Alaska expressly provided that respondent did not assume or accept any collective bargaining or labor agreements of its predecessor (Pl. Ex. 1, R. 114, 117). The employees at the sawmill had been represented by Local M-271 of International Woodworkers of

America (CIO), hereinafter sometimes referred to as I.W.A. Shortly after the commencement of operations the I.W.A. requested respondent to negotiate a contract with it (R. 125). Upon receiving satisfactory assurance that the I.W.A. represented a majority of its production employees respondent agreed to recognize it as their exclusive bargaining representative and commenced negotiations looking toward a contract (R. 129, 130, 144).

The contract between respondent and the I.W.A. was executed on November 3, 1947, and covered all production employees of the company at the mill, as is normal in CIO representation clauses (R. 130, 131, 302, Pl. Ex. 2). It was expressly understood that the contract's recognition clause covered yard employees in all their duties, including loading barges (R. 302, 303), and that the sawmill workers would load everything, including barges, where respondent's equipment was used (R. 302, 303, 357). This agreement was made after local I.W.A. officials had conferred with their International and had received from it an opinion that they were entitled to include employees performing such work within the coverage of the I.W.A. contract (R. 349, 550, 551, Pl. Exs. 8 and 9).

On several occasions prior to the execution of the contract between I.W.A. and respondent, representatives of both petitioners had requested that respondent execute "coastwise" and local contracts under which their members would be entitled to the loading of respondent's barges (R. 150-159, 161-165, 183, 188, 192, 574). They admitted, however, that they did not represent any of

respondent's employees (R. 192, 298). They were told that respondent had recognized the I.W.A. as the exclusive bargaining representative for all of its production employees at its mill (R. 160, 189) and that it could not and would not contract with any other union (R. 299).

The first barge load of lumber was loaded by respondent's employees and shipped in October, 1947. Although threats were made by the longshoremen that this barge would not be unloaded (R. 221, 299), it was in fact unloaded without incident. The mill was closed during the winter months of 1947-1948, but in March, 1948, respondent commenced to accumulate a load of lumber on another barge (R. 202). At this time representatives of petitioner Local 16 called upon respondent and again demanded the work of loading the barges (R. 200, 201, 202).^{*} When this request was again refused, representatives of Local 16 presented its claim at a meeting of the I.W.A. (R. 391).

During the interim between the execution of the contract with respondent and the time of the meeting the officers of the I.W.A. had changed and the new officers were not aware that their predecessors had been expressly authorized by the I.W.A. international office to include the work of barge loading in their contract with respondent (R. 262). The longshoremen's representatives at the meeting referred to announced their intention to

^{*}The loading of respondent's barges by its employees did not "divert work" from petitioners' members or cause reduction in their income. It was newly created work, since Army personnel had previously removed the lumber from petitioners' mill during the term of the contract with the Corps of Engineers (R. 154).

establish a picket line at respondent's plant if they could not induce respondent to give them the barge loading work, and asked the I.W.A. to respect the picket line when established (R. 396, 397). By false representations they prevailed upon respondent's employees to give up the barge loading work and respect the picket line "until more could be found out about the situation" (R. 393-397, 414).

The barge loading was only an intermittent part of all the work at the mill and the jobs of over 200 men were at stake (R. 257, 484). The members of the I.W.A. agreed to accede to the I.L.W.U. demand because they feared the mill would be shut down and they would lose their jobs (R. 339, 484); because they wished to avoid trouble (R. 849); because they feared violence if they should go through the picket line (R. 849, 873); because they feared the effect of being blacklisted (R. 848); and because they were deceived by petitioners into the belief that the longshoremen had a contract with respondent which entitled them to the work (R. 263, 407, 843).

When respondent refused to accede to the demands of the longshoremen, a picket line was established at its plant on April 10, 1948 (R. 207). Respondent's employees refused to cross the picket line and the mill shut down (R. 259, 310).

Following the closing of the mill continuing efforts were made to induce the longshoremen to remove the pickets and permit the mill to operate. The Mayor of Juneau appointed a fact-finding committee to investigate and attempt to resolve the dispute (R. 964). A repre-

representative of petitioners, Verne Albright, attacked the Mayor's recommendation as "an employer-inspired publicity dodge" (Pl. Ex. 17, R. 780, 781). It was proposed that the dispute be submitted to the National C.I.O. Council, but Albright rejected this suggestion also (R. 426). An officer from the international office of the I.W.A. and a representative of the United States' Mediation and Conciliation Service came to Juneau to attempt a settlement (R. 417, 418). A proposal was made to them by respondent which might have resolved the dispute, but at the last moment it was rejected by Albright on orders from the San Francisco headquarters of the I.L.W.U., because it was felt that the settlement might establish a bad precedent for the longshoremen (Pl. Ex. 6, R. 419-426). Throughout the period petitioners maintained a pretense of desiring to "negotiate," but they meant by use of that term nothing but capitulation to their demands (R. 525-528).

During the time the mill was closed Albright, the I.L.W.U. International representative for Alaska, acted as spokesman for the longshoremen (R. 432). He addressed meetings of respondent's employees, urging them not to cross the picket line, advising them that if they did so they would be "blackballed" and that in any event their jobs would be temporary because the company would be unable to unload its lumber in the States (R. 443, 444).

Respondent's employees were anxious to return to work, but were uncertain whether they should do so (R. 539, 541). They had discovered that the representations

made by petitioners to induce them to relinquish the barge loading and to respect the picket line were in fact false (R. 414). Nevertheless, petitioners refused to remove the picket line except upon their own terms (R. 431-433). About July 2, 1948, the members of the I.W.A. voted to return to work and to claim the right to load the barges (R. 438, 441). This was not (as stated in the petition) the first claim which I.W.A. made to the work. It was a reaffirmance of the original position of that union (R. 302, 303, 349, 352, Pl. Exs. 8 and 9, R. 551).

The mill reopened on July 19, 1948, with a small crew, but the picketing and other activities of petitioners continued. Albright thereupon branded the sawmill workers who had returned to work as strikebreakers (R. 958-962, 780, 781, Pl. Exs. 17, 18, R. 779-782; Pl. Ex. 23, R. 958-961). Germain Bulcke, vice president of the I.L.W.U., notified all Canadian locals of the I.L.W.U. that Juneau Spruce products were unfair and this information was publicized in the official I.L.W.U. newspaper (Pl. Ex. 23, R. 973-978). Longshoremen refused to load any of respondent's products on commercial steamers (R. 285, 294).

In August, 1948, a barge was loaded with lumber by respondent's employees, and departed for Prince Rupert, B. C. Threats were made that the barge would be followed (R. 763). Albright and another I.L.W.U. representative were in Prince Rupert when the barge arrived (R. 787, 788). The longshoremen in Prince Rupert refused to unload the barge, acting upon orders from John Berry, International representative of I.L.W.U. for Brit-

ish Columbia, who, in turn, was acting on orders from I.L.W.U. headquarters in San Francisco (R. 620-627). Respondent was forced to move the barge to Tacoma, Washington, one of the few Pacific Coast ports not controlled by I.L.W.U., and succeeded in getting it unloaded there (R. 687, 774). But when respondent sent a second barge load of its lumber to Tacoma in September, 1948, it discovered that even this port was closed to it. The barge remained in Tacoma and was not unloaded until during the course of the trial over six months later (R. 437, 438, 687).

As a result of its inability to unload any of its lumber respondent exhausted its storage space and was again forced to close the sawmill on October 11, 1948 (R. 696).

In October or November, 1948, representatives of petitioners called on respondent and stated that they wished to negotiate on the barge-loading issue (R. 703, 730). Respondent's manager informed them that if the I.L.W.U. could agree with the I.W.A. on some practical basis, he would recommend to respondent that it be accepted (R. 705). But this proposal came to naught. When petitioners met with the I.W.A. they increased their demands to include not only the actual loading of respondent's barges, but also demanded sling men on the dock (R. 544-547).

At the time of trial, despite a ruling by the National Labor Relations Board, dated April 1, 1949, that the longshoremen were not entitled to the work in question (82 NLRB 650), the unlawful activities of petitioners continued. Picketing still went on at respondent's plant

(R. 411), and on May 2, 1949, while the trial was in progress, John Berry, acting on orders received from I.L.W.U. headquarters at San Francisco, again refused to permit lumber to be unloaded at Prince Rupert (R. 626).*

The unlawful activities of petitioners, in seeking to force respondent to displace a small portion of its I.W.A.-represented employees for the benefit of petitioners' members, caused damage to respondent alone in excess of \$1,000,000 (R. 742, 759; Pl. Exs. 14, 15). These figures did not take into consideration other substantial items such as loss of markets, damage to retail business, and deterioration in lumber and log stocks (R. 717, 758).

SUMMARY OF ARGUMENT

I. A cause of action under Section 303(b) of the Act depends only upon the commission of the actions therein proscribed and is not dependent upon any action taken by the National Labor Relations Board.

A. The Act bears intrinsic evidence that there was to be a clear separation of private rights and public enforcement proceedings. This is disclosed by the language used and the fact that private remedies were placed in a separate title in which all subjects described were outside of the Board's orbit.

*The pickets were not removed until May 9, 1949, shortly before the Regional Director's anticipated application for an injunction (*Bulcke et al v. Graham, Regional Director*, 91 F. Supp. 615), which was issued on May 14, 1949. (*Juneau Spruce Corp.*, 90 NLRB, No. 233, Note 5).

B. The legislative history of the Act shows that the primary purpose of Congress was to prevent jurisdictional strikes and secondary boycotts. Originally this was to be accomplished by making them unfair labor practices and giving the Board power to enforce the prohibition.

Because it was felt that this machinery might not be sufficient to prevent them, the right to a damage action was added as an additional deterrent. Another primary reason for giving the right to seek damages was the belief in Congress that if such acts should be committed, a party injured by such practices should have a speedy and direct remedy rather than to be dependent upon an administrative agency. Both of these purposes of Congress would be frustrated if the damage action must await prior Board action.

Moreover, petitioners' contention is built entirely upon its misconception of the power of the Board in jurisdictional strikes cases. Originally it was to have the right to arbitrate disputes between unions over the right to do particular work. But this power was lost when Section 8(b)(4)(D) was changed from protection of the union's jurisdiction to protection of the employer's work assignment. As the law now stands, where an employer's assignment is involved, the Board acts under Section 10(k) not as an arbitrator but in a purely ministerial capacity.

A violation of Section 8(b)(4)(D) and Section 303(a)(4) is complete upon commission of the acts therein

mentioned since each contains a complete description of the conduct proscribed. When petitioners state that the unfair labor practice is defined by Section 8(b)(4)(D), taken together with Section 10(k), they confuse substance with procedure, for the latter section deals only with procedure after a charge is made that Section 8(b)(4)(D) *has been violated*.

C. The construction placed on the Act by the Board supports respondent's views. Where an employer's assignment of work is involved the Board has disclaimed arbitration powers, and has regarded the assignment as determinative. *Juneau Spruce Corp.*, 82 N.L.R.B. 650; *Los Angeles Bldg. and Construction Trades Council*, 83 N.L.R.B. 477. Only where the employer stands neutral and in effect requests the Board to make the assignment has the Board arbitrated jurisdictional disputes. *Winslow Bros. and Smith*, 90 N.L.R.B. 1379.

The Board has not held that a violation of Section 8(b)(4)(D) occurs only upon noncompliance with its determination under Section 10(k). It holds merely that there must be such noncompliance before a cease-and-desist order will issue.

D. The Court of Appeals' construction of the Act does not produce inconsistent or unreasonable results. Petitioners' prediction that the Board and the courts may reach contradictory results cannot occur since (absent a certification) the employer's assignment is determinative and will not be altered by the Board.

Even if the Board possessed power to disregard the

employer's assignment, it would not be inconsistent or unreasonable to forbid jurisdictional strikes under penalty of liability for damages pending Board action under Section 10(k). Congress intended to prevent jurisdictional strikes and Section 10(k) only dealt with procedure if they should nevertheless occur. The right to a damage action was also intended to prevent such strikes and compel resort to lawful procedures, whether through the Board or otherwise. It would have no deterrent effect if dependent upon later Board action.

II. The rulings of the trial court on matters of jurisdiction, service of process and agency were correct.

A. Petitioners concede that the rulings were proper if the trial court was a "district court of the United States" within the meaning of the Act. The diverse methods employed to describe the Federal courts throughout the Act indicate that the term was not used as one of art to describe only courts created under Article III of the Constitution.

The term is not always used to describe only Constitutional courts but has been used to describe territorial courts as well. *In Re Cooper*, 143 U.S. 472, 494, 12 S.Ct. 543; Section 451, Title 28 U.S.C. The Act here refers to such courts in Sections 11(2) and 302(e) as "United States courts of the Territories."

An interpretation of the term as used here to exclude territorial courts would lead to unreasonable results by withholding machinery for enforcement in the territories. In such cases the court will "look beyond the words to

the purpose of the Act", and hold the term to include territorial courts. *United States v. American Trucking Assns.*, 310 U.S. 534, 60 S.Ct. 1059; *Federal Trade Commission v. Klesner*, 274 U.S. 145, 47 S.Ct. 557.

B. In any event the limitations and provisions of Section 301 of the Act applied to the trial court in its capacity as "any other court having jurisdiction of the parties", referred to in Section 303(b). Petitioners concede that the Alaska court may be so classified but contend that the phrase in Section 303(b) reading "subject to the limitations and provisions of Section 301" applies only to actions in "district courts of the United States."

As so interpreted the Act would have the result of rendering members of labor unions personally liable on judgments in state and territorial courts while relieving them from such liability in district courts of the United States. This absurd result in violation of the obvious intent of Congress can only be avoided by recognizing that the qualifying phrase in question was inadvertently inserted between the designations of courts instead of after such designations.

C. The rulings of the trial court were correct in any event as they complied with general law applicable in Alaska.

III. The trial court did not err by refusing to give petitioners' proposed instructions. Requested instructions 1, 12 and 13 consisted of misleading and abstract quotations inapplicable to the issues in the case.

Requested instruction 2 was also misleading and ab-

abstract. It improperly implied, with no supporting evidence, that respondent had refused to bargain with IWA, that it was required to forego rights under its labor contract and to discriminate against employees in violation of law.

ARGUMENT

I. THE ONLY PREREQUISITE TO A CAUSE OF ACTION UNDER SECTION 303(b) OF THE ACT IS THE COMMISSION OF THE ACTS DESCRIBED IN SECTION 303(a).

The cumulative effect of the petition herein and petitioners' brief is to create a false aura around the issues for decision here, the decision below, and the facts. Petitioners would apparently seek to obtain from this Court an advisory decision on a hypothetical set of facts. Because inherently fallacious hypotheses permeate every phase of petitioners' argument in both their petition and brief, clarification at the outset of the issues and the facts will set at rest the difficulties petitioners create for the administration of the law as a result of the decision below. These difficulties arise from questions not raised or decided below and facts not in the case.

For example, on page 6 of the petition it is said that one of the questions for determination of this Court is

"Whether a labor organization, whose claim that the employees it represents are entitled to perform particular work is upheld by the Board in a determination under Section 10(k), can nevertheless be

sued for damages for primary activities directed at compelling the employer involved to abide by the Board's award."

On page 17 of the petition it is said that the Court of Appeals

" * * * determined that a union which engaged in a primary strike against an employer to require him to assign particular work to employees whom it represented was liable for any damages caused, even if the Board had previously determined in a proceeding under Section 10(k) that the employees represented by the striking union were entitled to the work."

Such statements are neither apt nor candid. They pose interesting questions when and if a case in which they were present should ever arise, but they have no relation whatever to this case, because

First, petitioners represented no employees of respondent but were mere interlopers seeking to force discriminatory conduct by respondent harmful to its employees who were represented by a union of their choice;

Second, the petitioners were never held by the Board in a 10(k) proceeding to be entitled to the barge-loading work involved, the Board instead having expressly rejected their contentions (82 NLRB 650);

Third, the petitioners' activities for which damages were sought by respondent were not simply "primary" but were "secondary" because the injury caused respondent was due in large part to its inability to get the employees of other employers (members of petitioners) to handle its products.

Even a summary of a portion of the statute set out in petitioners' brief last filed is not free from the same misleading implications. On page 3 they summarize in advance Section 10(k) of the National Labor Relations Act (29 U.S.C.A. §160(k)) by saying that under it the National Labor Relations Board

"* * * determines which employees in a jurisdictional dispute are entitled to particular work * * *"

Such a condensation of the statute's language is at least out of place in this case. It is only in rare instances, if at all, that the Board makes such a decision. And again the inference from this language, when placed in this case, is that petitioners represented employees of respondent and could thus rightly claim before the Board the work of loading respondent's barges. Such an inference is completely false.

Accordingly, the only issue here is whether a person can maintain an action under Section 303(b) against a labor organization representing none of his employees for damages caused by activities clearly in violation of Section 303(a)(4) without awaiting the outcome of proceedings by the Board under Title I of the Act.

In the discussion which follows the Labor Management Relations Act will sometimes be referred to as "the Act" in order to distinguish it from one of its separate parts, the National Labor Relations Act. The latter will sometimes be referred to as the "NLRA."

A. The Act Itself Contains Intrinsic Evidence That Actions for Damages Under Title III Were Not to Be Dependent Upon Action of the Board Under Title I.

The meaning of the statute here involved is complicated only as petitioners in their brief make it so. Respondent brought an action against petitioners under Section 303(b) of the Labor Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136, P.L. 101, 80 Cong. 1 Sess., 29 U.S.C. (Supp. III) §187(b)), alleging facts bringing petitioners' conduct within the description of Section 303(a)(4) of that Act (29 U.S.C. (Supp. III) §187(a)(4)). This case, then, involves only the following statutory language:

"Sec. 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is —"

* * * * *

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make un-

lawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

By its terms, the statute upon which respondent's action was predicated stands completely alone. It depends for its sustenance upon no other part of the comprehensive Act in which it is found. It is in its language a complete and self-executing whole.

But petitioners contend that this Court must supply what Congress did not—a connective between this and other portions of the Act which would transform this independent cause of action into a complete parasite, having no life in itself but drawing its only vitality from an agency which was quite evidently believed by Congress to act expeditiously only under statutory prodding.

"Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.

"Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, fol-

The fact, say petitioners, that Congress did not say that the cause of action allowed by Section 303(b) must be conditioned on what, if any, action the General Counsel might take and what the National Labor Relations Board might then decide, is of little consequence. Despite that lack this Court must now supply it because: (1) Section 303(a)(4) of the Act and Section 8(b)(4)(D) of the National Labor Relations Act read exactly the same; and (2) it would be awkward, and contrary to the Act's construction if it were possible to have the same proscribed activity before the Board and the Courts at the same time.

As we shall show, these contentions are without merit.

1. The Plain Language of the Act Authorizes Actions for Damages Without Awaiting Action of the Board.

As we have stated, there is no ambiguity in the language employed in Section 303 of the Act, which says nothing of there being other conditions precedent to an action for damages. If Congress had so intended, it would have been easy for it to have said so. In similar circumstances this Court met a plea to change the terms of a

lowed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.” (Emphasis added.) Senate Report No. 105 on S. 1126, 1 Leg. Hist. 414.

(Like petitioners, respondent believes the most satisfactory reference to the legislative history of the Labor Management Relations Act, 1947, to be the two-volume history published by the National Labor Relations Board. All references hereafter entitled “Leg. Hist.” will be to this work.)

statute with these words:

"If Congress had deemed it necessary or even appropriate that the Administrator's orders should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 64 S.Ct. 474.

This is not to say that the courts should deem themselves bound by the literal wording of a statute even where to do so will obviously frustrate the legislative intent. But where, as here, the language used is apparently plain and unambiguous it should not lightly be assumed that Congress did not mean what it said.

2. The Duplication of Language in Sections 303(a) and 8(b)(4) Shows That Completely Separate Remedies Were Intended.

The identity of the language found in Sections 8(b)(4)(D) and 303(a)(4), instead of showing an inter-relation between the sections, actually confirms our contention that the remedies therein provided were to be independent of each other. If petitioners were correct in their contentions, the simple and logical way of accomplishing the objective would have been to provide in Section 303 that an action for damages would lie for the commission of the acts described in Section 8(b)(4).

The fact that the statute was not so worded indicates an apprehension on the part of the sponsors of the legislation that the result might be precisely what petitioners now claim, namely, that private rights and remedies would be made dependent upon action by the Board. The

simple and logical way to forestall this result was to make Section 303 complete within itself by spelling out therein the specific acts which Congress wished to make unlawful, in order that no one be misled into the belief that these rights and remedies were subordinate to the powers of the Board. We shall hereafter point out that this was exactly what Congress wished to accomplish.

3. As Drafted Title III of the Act Deals Only With Subjects Outside the Ambit of the Board's Responsibilities and Powers.

In drafting the Labor Management Relations Act, 1947, the framers, instead of proceeding by separate bills, elected to employ one comprehensive bill divided into distinct titles, although this course was deplored by some of the Act's critics.² Title I amended the previous National Labor Relations Act, even giving this Title of the bill its own separate "short title" (Title I, Sec. 17). Title II stated Federal policy in, and provided new machinery for, the peaceful settlement of those disputes which sometimes arise at the bargaining table after the parties have freely come there, especially in those disputes which create national emergencies. Title III dealt with practices which, while in the generalized field of "labor law,"

²From Senator Thomas' Separate Report on S. 1126 (1 Leg. Hist. 455): "It would make better sense not to lump unrelated subjects into one omnibus bill * * *

"I believe the majority party acted unwisely in not following my suggestion of several bills for several subjects * * *

Senator Morse on the floor (2 Leg. Hist. 1507):

"I deeply regret that the Senate did not see fit to proceed with labor legislation one issue at a time, by way of one title at a time: * * *"

are wholly apart from organization and bargaining procedures and their occasional consequences treated in the preceding two titles. Title IV set up a Congressional committee to study the entire field of labor-management relations and its impact on the national welfare. Title V simply provided definitions for Titles II, III, and IV.

Title III, in which Section 303 appears, was intended to and did embrace subjects which Congress completely removed from the scope of Title I, and therefore from any control by the Board. One of the most conclusive indications of this scheme is the treatment accorded violations of labor contracts. When Senator Morse thought these should be made punishable, but only as unfair labor practices,³ the framers finally agreed that a deterrent should be provided against such practices;⁴ but over his protest⁵ placed the matter beyond reach of the Board by taking it out of Title I and leaving it instead wholly in Title III as Section 301(a) of the Act.

Likewise, when dealing with the "involuntary check-off" and prohibiting it by providing that deductions for union dues and initiation fees could be made only if the employee authorized such a deduction in writing, Congress did not place the decision within the purview of the Board by calling it an unfair labor practice. Instead it included the prohibition in Title III of the Act.⁶ So also for the regulation of "union welfare" funds, the Board

³S. 858 (the so-called "Morse bill") Sections 8(a)(6) and 8(b)(5): 2 Leg. Hist. 982.

⁴This provision of the Morse bill was included in S. 1126 as reported, 2 Leg. Hist. 440, 441.

⁵2 Leg. Hist. 1558.

⁶Section 302(c)(4).

was not included in the machinery provided for determination or enforcement of the prohibition.

Thus the scheme of Title III is clear. Whatever effects its prohibitions may have on representation and bargaining dealt with in Title I, none of the remedies in Title III are to be qualified in any respect by any rights or duties of the parties involved as defined by Title I's amendment to the National Labor Relations Act, or by any determination of the Board, except where specifically so stated.

That there are some effects of Title III on the Board's duties, and the rights and duties of the parties under Title I, is apparent. The requirements for validity of "health and welfare" funds undoubtedly inhibit some aspects of bargaining at the conference table. So also with the denial of the involuntary check-off. But the lack of dependence of any of the provisions of Title III on any of the procedures to control unfair labor practices under Title I is completely shown by the terms of Title III.

The involuntary check-off is not forbidden only if the Board finds it results in coercion or domination under Title I although Congress might have so provided, since such check-offs had sometimes been found objectionable by the Board on such grounds.⁷ Instead these were prohibited by Title III. And in regulating "health and welfare" contracts Congress could have given expression to its evident fears that agreements in this field might be used for purposes of domination or coercion of employees⁸ and prohibited only such as the Board held did

⁷*Virginia Electric and Power Co. v. N.L.R.B.*, 319 U.S. 533, 63 S.Ct. 1214, affirming 44 N.L.R.B. 404; *Food Machinery Corp.*, 41 N.L.R.B. 1428.

so. But it chose to lay down a flat prohibition in Title III instead of solving the problem by leaving it to the Board for preliminary determination under Title I.

These actions of Congress in framing the terms of Title III demonstrate clearly that the pattern followed with respect to causes of action for jurisdictional disputes and secondary boycotts were, by inclusion in that Title, meant to be independent of Board action under Title I. It would be strange indeed if by silence in this lone instance Congress meant to make this activity dependent on the action of the Board where that same silence in every other instance indicated the clearest of intention to divorce the matter from anything prescribed in the National Labor Relations Act.

4. The Absence from Section 303(b) of Any Reference to Section 8(b)(4)(D) of the N.L.R.A. Was Not an Oversight.

While the comment of the court below in *Printing Specialties, etc., Union v. LeBaron*, 171 F.(2d) 331 that " * * * the statute is by no means a model of draftsmanship, * * * " is borne out by many of the terms and descriptions used, notably in its varying descriptions of the courts Congress had created, it is quite evident that this legislation was carefully conceived and drawn insofar as its internal organization was concerned. Its attention to detail was clear in the field — and only, perhaps, in the field — of back-reference and inclusion or exclusion of other acts or sections of the Act.

*2 Leg. Hist. 1304, 1310-1313.

This care is especially well illustrated in the relations between Titles I and III. A great majority of Congress thought that in this Act the injunctive powers of the Federal courts should be restored in secondary boycott and jurisdictional dispute cases, but divided on whether injunctions should issue at the request only of the appropriate Federal agency/or, in addition, at the behest of the injured party. The former view prevailed.*

But in allowing "any person injured" an action for damages which arose from a jurisdictional dispute or secondary boycott Congress was very careful by its silence to make it clear that no court would construe the provision for such a cause of action to mean that the Norris-LaGuardia Act was inadvertently amended thereby. So while in Title I Congress was careful to retain the previous Act's statement of inapplicability of the Norris-LaGuardia Act in cases where the Board seeks injunctions¹⁰ in these as well as other unfair labor practices, and to insert in Title II a corresponding provision for a "national emergency" strike injunction,¹¹ it was careful *not* to insert any language in Section 303 which would yield a comparable result. There can be no doubt that this silence was deliberate.¹² Two courts of

*The "Taft Amendment," eliminating the injunctive features of the "Ball Amendment," was enacted 2 Leg. Hist. 1400, after the Ball Amendment was defeated, 2 Leg. Hist. 1370.

¹⁰Section 10(h).

¹¹Section 206(b).

¹²Mr. Taft. " * * * Whatever may be the fact as to what relief courts will give in civil suits for damages or otherwise, obviously, the amendment still remains subject to the Norris-LaGuardia Act * * * "

appeal have had no difficulty in finding from it the result Congress clearly intended,¹³ and this court has disposed of a contrary contention in summary fashion.¹⁴

This selectivity in the Act's silences is not accidental. Meaning was given by what was not said as well as words themselves. Thus to contend, as petitioners must, that the omission of a connective between Section 303(b) and Section 8(b)(4)(D) was an inadvertence flies in the face of every requisite for ascertaining meaning from the text of the statute itself.

B. The Legislative History of the Act Discloses That Actions for Damages Under Title III Were Not to Be Dependent Upon Action of the Board Under Title I.

The plain language of the Act shows, as the Court of Appeals noted, that there is no reason to presume that Congress intended an adverse and disregarded National Labor Relations Board determination to be a condition precedent to liability under Section 303(b) of the Act. Nevertheless an inquiry into the legislative history confirms the view of the court below that no prior determination of the Board is required to precede an action for damages under Section 303(b).

¹³*Amazon Cotton Mill Co. v. Textile Workers Union* (CA 4, 1948), 167 F. (2d) 183; *Amalgamated Association, etc. v. Dixie Motor Coach Assn.* (CA 8, 1948), 170 F. (2d) 902.

¹⁴*Bakery Sales Drivers Local, etc. v. Wagshal*, 333 U.S. 437, 442, 68 S.Ct. 630.

1. Congress Clearly Intended That Actions Under Section 303 Be Independent of the Board's Action Under Sections 8(b)(4)(D) and 10(k).

As the face of the Act discloses, there are at least three reasons why petitioners' concept of the statute, as applied to the case here, is not tenable: (1) No such limitation is stated in Section 303(b); (2) the identity of language in Sections 303(a) and 8(b)(4)(D) discloses an intent *not* to make the former refer to the latter, rather than the contrary; and (3) the placing of Section 303 in a separate title from Section 8(b)(4)(D), indicates an intent to exclude for all of its subjects any connection with procedures of the National Labor Relations Board or the preliminaries or processes of collective bargaining. The history of this Section as it found its way into the Act completely confirms the plain reading of the statute in these respects.¹⁷

When Congress began its work on the legislation which became the Labor-Management Relations Act, 1947, it had in mind control of two types of union activity then unrestrained: (1) unfair labor practices of the kind defined under the "Wagner Act" (Act of July 5, 1935, 49 Stat. 449) as harmful to collective bargaining processes and the free choice of representatives for that function; and (2) practices only indirectly connected with the bargaining table or freely arriving there.

¹⁷Petitioners' references to statements they apparently believe demonstrate the contrary, found at pp. 23 and 24 of their brief, disclose only that the description of the activity proscribed was intended to be the same. But no word in them, especially if they are put in true context, discloses the conception of Section 303 petitioners claim for them.

and involving principally a struggle for union advantage, in which third parties in the form of employee hostages, employers, and the general public suffered the major share of the damage without recourse to the Board or the courts.¹⁸

The kind first described caused relatively little difficulty, being added to the list of unfair labor practices for the Board's attention under Section 8 of the National Labor Relations Act, which was to become Title I of the new Act. But the second class of activity caused concern, from description to treatment. The House called them (jurisdictional strikes and secondary boycotts) "unlawful concerted activities"¹⁹ and would have banned them completely by prescribing severe penalties for their commission.²⁰ The Senate bill as reported to the floor, however, dealt more gently with them by adding them to the unfair labor practice section of Title I of the new bill, thus making their prevention a function of the Board.²¹

But the feeling was strong, even within the Senate Committee on Labor and Public Welfare, that this one deterrent was insufficient.²² Accordingly, Senators Ball, Byrd, Donnell and George introduced as Section 303 of Title III in the bill an amendment,²³ here referred to as

¹⁸ *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L. Ed. 819; *N.L.R.B. v. Gluek Brewing Company*, 144 F. (2) 847.

¹⁹ H.R. 3020, 80th Cong., 1 Sess., §12(a)(3), as passed.

²⁰ H.R. 3020, 80th Cong., 1 Sess., §12(b), (c), and (d), as passed.

²¹ S. 1126, 80th Cong., 1 Sess., §8(b)(4).

²² Supplemental views on S. 1126, Part 4, by Senators Taft, Ball, Donnell and Jenner. (1 Leg. Hist. 460.)

²³ 2 Leg. Hist. 1323.

the "Ball amendment," which copied the description of jurisdictional strikes and secondary boycotts from Section 8(b)(4)(D) of Title I, but superimposed new remedies in addition to those provided for within the confines of Board action. This amendment gave the person injured both the right to seek injunctive relief and the right to sue the offenders for damages. Senator Taft immediately introduced an amendment in the nature of a substitute which retained only the latter right²⁴ and the two were at this juncture frequently considered together.²⁵

The intention of the sponsors of the Ball amendment that the additional remedies authorized in this class of cases was to be in addition to, and not dependent on, whatever the Board did with secondary boycott and jurisdictional dispute charges under Section 8(b)(4), is clear beyond any doubt. In the explanation of this amendment to be proposed, the writers of the supplemental views on S. 1126 (Senate Report 105) said:²⁶

"There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes, or as to the necessity of giving injured third parties a remedy against their operation * * * To a small storekeeper, or machine shop, picketed out of business by unions intervening between him and his employees, or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the National Labor Relations Board is a weak reed. There will only be a

²⁴2 Leg. Hist. 1346.

²⁵See 2 Leg. Hist. 1357, where Senator Morse expressed his opposition to both the Ball amendment and its substitute.

²⁶1 Leg. Hist. 460.

satisfactory remedy if he can go to his local court and obtain an injunction, first temporary and then permanent, against interference of this kind."

* * * * *

"The amendment proposes that he be entitled to file a suit for damages and obtain a temporary injunction while that suit is being heard."

When the proposed amendment was debated on the floor it was clear to all Senators that it provided remedies against this limited class of activity which would enable the injured party to obtain his own relief both by injunction and by a damage action, irrespective of what the Board did with a charge for the same offense. In fact, the great benefit the proponents saw in the amendment was that it gave the right to injured parties to control their own litigation and thus avoided the delay and uncertainties they felt inherent in Board action in these cases, in which injury was so grievous and delay so destructive. In explaining his amendment Senator Ball said:

"The amendment deals with secondary boycotts and jurisdictional strikes, which are universally condemned. I think the committee bill deals with them one way. It is proposed in the amendment to deal with them in a different way.

* * * * *

"So there is no difference between the definition of secondary boycott and jurisdictional strike in the pending amendment and the definition in the committee bill. *The difference lies wholly in the remedy proposed.*"²⁷ (Emphasis supplied.)

* * * * *

"The committee bill and the proposed amendment differ also in this respect: First, under the amendment an injured party—and he is usually an innocent third party—suffering from a secondary boycott or jurisdictional strike, is given the right to go directly into a district court and seek injunctive relief, whereas, under the committee bill, such an individual is forced to go through a bureaucracy, the National Labor Relations Board, and let the regional attorney for the National Labor Relations Board decide whether his case should be presented to the court. The committee bill gives the court final jurisdiction * * *.

"I have said that the pending amendment would simply give to those employees and to their employers the right to go directly into court to protect their right to freedom from this kind of racketeering pressure, whereas the committee bill routes them through a bureaucracy, and that bureaucracy possesses the right to say whether the court shall finally pass upon the merits of the case."²⁸

"The pending amendment would change the committee bill in two other respects. First, the language in subsection (c) would permit any person injured by such racketeering practices to sue and to recover damages actually suffered and the cost of the suit. That is similar to the provision of the Taft substitute."²⁹

After a colloquy with Senator Donnell, Senator Wherry said:

"Mr. Wherry. I wish to thank the distinguished Senator from Missouri for bringing out that point so clearly, because it seems to me that the person concerned should control his own rights of litigation, and should not have to depend, when it comes to

²⁸2 Leg. Hist. 1350.

²⁹2 Leg. Hist. 1353.

the question of going into a court of law and applying for damages or for injunctive relief, upon the judgment of some bureaucrat in whom is lodged the power to determine whether such a course should be followed.

"This amendment, as I understand, would permit a person to go into any court and there use his own judgment in regard to the question of applying for injunctive relief or in regard to the question of whether he should sue for damages. Am I correct about that?"

"Mr. Ball. That is correct."

While the provision of the Ball amendment relating to the rights of private persons to seek injunctive relief stirred up a storm of controversy, the other provision of the amendment relating to the other independent right of the injured party to sue for damages when injured by jurisdictional strikes or secondary boycotts, was generally approved. Senator Ives, a member of the Senate Committee on Labor and Public Welfare, was strongly of this view. He stated very clearly³⁰ that he was opposed to the Ball amendment because it revived the injunction upon request of an employer, and also that the Committee bill

"* * * would be sufficient without the injunctive procedure proposed by the Senator from Minnesota."

But he continued³¹

"As I understand, a substitute amendment will be offered, to authorize the bringing of actions for damages in the Federal courts under certain conditions

³⁰2 Leg. Hist. 1356.

³¹2 Leg. Hist. 1357.

as I have indicated. I know of no reason in the world why actions for damages should not be permitted in the Federal court. That is perfect legitimate. I know of no reason in the world why one suffering from such abuses or violations should not have the right to recover damages, not only in the Federal court, but in any court."

Then referring to Senator Wherry's expressed view, above quoted, that an injured party should not have to depend upon the judgment of an administrative officer whether he should seek relief in a court of law, Senator Ives said:

"I want to point out to the Senator from Nebraska, and any other Senators who may have made the point, that in my judgment the right to recovery as proposed in the amendment offered by the Senator from Ohio will take care of the situation about which the Senator from Nebraska inquired. Once it is established that recovery may be had for damages in the Federal courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott."

The Ball amendment was defeated³² after Senator Taft advised the Senate that he was withdrawing his substitute to the Ball amendment and would offer it as a new amendment when and if the Ball amendment were defeated.³³ Accordingly he introduced the "Taft amendment" immediately the Ball amendment was defeated.³⁴ In explanation of his amendment he said:³⁵

³²² Leg. Hist. 1370.

³³² Leg. Hist. 1365.

³⁴² Leg. Hist. 1370.

³⁵² Leg. Hist. 1370, 1371.

"This is similar to the Ball amendment, dealing with jurisdictional strikes and secondary boycotts. It eliminates the injunctive process, the suspension of the Norris-LaGuardia Act, which I found was creating so much difficulty and opposition to the Ball amendment. *It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.*

" * * * Further, I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes. I may say that, so far as I know, no defense of this kind of strike was made throughout the testimony. There was a suggestion that there was some kind of 'good' secondary boycott, but no one was ever able to point to it and say what it was. I think, since the sentiment of the Senate is against the injunctive process, I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost. I do not think suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent to prevent unions undertaking this kind of racketeering activity." (Emphasis supplied.)

As so explained, and after the insertion of the words "for the purpose of this section only" after "unlawful" at the beginning of the section, the Taft substitute was enacted as a part of the Senate bill.³⁶ With further amendments not germane here the bill thus went to conference.³⁷ The conferees made no change in the Senate

³⁶2 Leg. Hist. 1400.

³⁷2 Leg. Hist. 1522.

bill insofar as is material to the point here discussed.³⁸

What the legislative history of Section 303 of the Act discloses, therefore, is a positive intent of the framers to keep the cause of action created by that Section free from any dependence on the Board or its determinations upon the filing of charges under Section 8(b)(4). As will be discussed in the subsection immediately following, it was this separation which was bitterly assailed by some of the Act's critics.

Thus there is shown a positive intention to do precisely what petitioners say was not done; and if petitioners were correct in their contentions, the statements made by both proponents and opponents concerning the policy of providing separate and independent remedies would have been utterly inexplicable. Had there been any notion that the Act provided what petitioners say it does in this respect, there would have been some clear acknowledgment by the proponents of this separate method of dealing with jurisdictional disputes that the cause of action was subsidiary to and followed the Board determination in a Section 10(k) hearing. Such statements, as that by Senator Morse that the Board and the courts could be dealing simultaneously with the same subject matter³⁹ would not have gone unchallenged.

³⁸House Conference Report No. 510, 80th Cong., 1 Sess., p. 67, 1 Leg. Hist. 571; Taft Summary of Conference Changes, 2 Leg. Hist. 1544.

³⁹"I do want to make the additional argument against the Taft substitute, that it makes it possible for *two different district courts and the N.L.R.B.* to be dealing *simultaneously* with the same subject matter. The Board would be conducting a hearing looking to a cease-and-desist order. At the same time the Board

Moreover, the President's views of the legislation, expressed in his veto message, would have been clearly incorrect had the Act provided what petitioners say it did, for there the President said:

"Moreover, since these cases would be taken directly into the courts, they necessarily would be settled by the judiciary before the National Labor Relations Board had a chance to decide the issue. This would thwart the entire purpose of the National Labor Relations Act in establishing the Board, which purpose was to confer on the Board, rather than the courts, the power to decide complex questions of fact in a special field requiring expert knowledge." (1 Leg. Hist. 920.)

Thus if petitioners are right in their views as to what the Act provides and the Congress intended, then everyone else connected with the progress of this legislation until it became law was wrong. The bill's sponsors were wrong, the bill's opponents and their criticism of the Section in question were wrong, and the President was wrong in his reason for his veto. If the complete separation of the cause of action for the activities proscribed in Section 303(a) were not to be completely free of any connection with the results of a charge of unfair labor practice under Section 8(b)(4), then every indicia by which the meaning of statutes is ascertained has been proven wrong in this case.

would be required, * * * to seek injunctive relief, which means that the (sic) would be two actions going on at the same time, or that there might be * * *.

"Finally, under this proposal, we have a third agency—probably a different Federal court—deciding whether a damage action lies. Such dispersion of authority, in my judgment, is very bad legislative policy." (Emphasis supplied.) 2 Leg. Hist. 1358.

The primary argument advanced in support of the Ball and Taft amendments was that a person suffering damages from a jurisdictional strike or secondary boycott, which all agreed were indefensible, should not be required to go through the National Labor Relations Board to obtain relief, but should have a right to bring his own case in court. Obviously this objective was not attained if the injured party is dependent, in the first instance, upon convincing the regional director that an unfair labor practice complaint should be filed and secondly upon what finding may be made by the Board in a 10(k) proceeding.

Second, the sponsors urged as a ground for giving the right of direct action, the need for speedy action in such cases and pointed to the fact that this could not be obtained through the Board. Certainly they accomplished nothing by the passage of the amendment if damage actions must await the outcome of proceedings before the Board.

Third, the sponsors contended that the power of an injured party to sue for damages would serve as a powerful deterrent to jurisdictional strikes. The deterrent, of course, is nonexistent if the labor organization may engage, as petitioners did here, in unlawful activities with impunity until after the Board has determined the dispute in a Section 10(k) hearing.

2. The Relation of Section 8(b)(4)(D) to Section 10(k) Does Not Support Petitioners' Contentions.

Petitioners' views of the case have other and equally serious defects. For even if the statute and Congressional

intent did not compel rejection of petitioners' contentions, an analysis of the Board's functions upon the filing of a charge under Section 8(b)(4)(D) would do so. Petitioners' belief that there is no offense under Section 8(b)(4)(D) until the disregard of a Board award makes one might have been correct if the Morse bill as written (S. 858) had been enacted. But it is completely incorrect under the statute passed by Congress.

Originally jurisdictional disputes were the particular province of Senator Morse, a majority member of the Senate Committee on Labor and Public Welfare. His bill, S. 858,⁴⁰ made such disputes unfair labor practices, but described them as disputes over whether work was performed by employees who were or were not members of a particular labor organization.⁴¹ Since the dispute described was a contest solely between two or more unions as to which should or should not perform particular work and without reference to the employer's position, it was natural that the Senator insert in his bill a Section 10(k), which was identical⁴² with the corresponding sub-

⁴⁰2 Leg. Hist. 1001.

⁴¹Section 8(b)(2)(A) of S. 858 (Senate Committee Comparative Print, March 18, 1947, p. 9). The specific language is:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to engage, or to induce or encourage the employees of any employer to engage, in a strike or in a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, in the course of their employment (A) because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization; * * *

(Emphasis supplied.)

⁴²Ibid., p. 16.

section as finally reported⁴³ (except that the descriptive subsection reference was of course changed). And with the offense so described, Senator Morse's "arbitration" method of dealing with an unresolved dispute was sensible, since the contest would be only between unions claiming certain work.

But though Section 10(k) remained as it had been in S. 858, the thing it was supposed to deal with was changed by S. 1126, as reported.⁴⁴ There the *employer's assignment* was made the crux of the contest, but as between two or more unions still.⁴⁵ In this form the description of the dispute passed the Senate in H.R. 3020 and went to conference.⁴⁶

Then the conferees made still another change in Section 8(b)(4)(D) still without changing Section 10(k). As the bill came back from conference⁴⁷ and was enacted over a veto⁴⁸ it designated additionally employees in any trade, craft, or class to whom work might be assigned by the employer.⁴⁹

⁴³1 Leg. Hist. 130.

⁴⁴1 Leg. Hist. 113.

⁴⁵As reported to the Senate, and then as passed, Sec. 8(b)(4)(D) read " * * * for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless * * * "

⁴⁶1 Leg. Hist. 291. •

⁴⁷1 Leg. Hist. 511.

⁴⁸2 Leg. Hist. 1657.

⁴⁹The pertinent language of the subsection is worth repeating here for comparative purposes with footnotes 41 and 45.

" * * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless * * * " (Emphasis supplied.)

Thus, the demise of the Board's discretionary duty under Section 10(k) was complete with the change in theory and language of Section 8(b)(4)(D), from the "craft union" approach to the "assignment of work" principle without a corresponding change in Section 10(k). In this connection the conference committee no doubt assumed that there was no occasion to change Section 10(k) since its provisions were only procedural and the Board would be required, in any event, to look to the substantive section for the criteria by which to "hear and determine the dispute." It is notable that the conference removed from Section 10(k) the power of the Board to appoint arbitrators since these were no longer required.

At any rate, as the two sections now stand, the Board's duty is not to *decide between union claims*, which may be on interunion work-defining agreements, traditional jurisdiction, *et cetera*, for which a skilled arbitrator would be needed. Instead, the questions for decision are simply: (1) To whom had the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Section 9(c) of the National Labor Relations Act?

Brought down to the issue here, the statute as enacted required no different approach, no different test, no different inquiry by the Board, in assessing the 8(b)(4)(D) violation, than that of the lower court in determining the validity of respondent's cause of action under Section 303(a)(4) and (b). That respondent had assigned the work in question — the loading of its barges — to mem-

bers of its plant crew, all of whom were represented by M-271, I.W.A. (CIO), was never even questioned, either in the court below or before the Board in the "10(k)" proceeding. In the Board case it was found,⁵⁰ here it was stipulated,⁵¹ that the respondent was not failing to conform to a certification of the National Labor Relations Board in making the aforesaid assignment, since there was no certification at all. Thus, while the Board has at least twice held⁵² — though without review of the rulings' correctness by any court—that the legislative progress of Section 8(b)(4)(D) did not in effect delete Section 10(k), its decisions clearly disclose that its inquiry is purely fact-finding and ministerial in character, having nothing of the skilled interunion jurisdictional arbitration about it.

These decisions are in complete conformity with the views of the legislative sponsors of the Act, as is disclosed by the supplemental views on the Senate bill wherein Senator Taft and the other authors said⁵³ of jurisdictional strikes and secondary boycotts:

"The facts in such cases are easily ascertainable by any court and do not require the expertness supposed to be one of the virtues of the administrative law procedure."

If the narrower, craft union approach to the problem had been retained intact from the Morse bill version of

⁵⁰See 82 N.L.R.B. 450.

⁵¹R. 1056.

⁵²*Moore Drydock Company*, 81 N.L.R.B. 1108, and *Juneau Spruce Corp.*, 82 N.L.R.B. 650, *supra*.

⁵³1 Leg. Hist. 460.

Section 8(b)(4)(D) the Board would have exercised the usual powers of an arbitrator in a Section 10(k) proceeding. But the sections grew apart; the procedure stood still but the substance changed. And since the major change took place in the Committee bill, much before Section 303 was attached as a floor amendment, no condition was put in Section 303(b); it would serve no useful purpose, for the question of who is entitled to the work (absent a Board certification) is decided by the employer's assignment.⁵⁴ This was recognized by both proponents and opponents in the debates on the Conference bill. Senator Murray inserted in the record a statement reading as follows (2 Leg. Hist. 1579):

"In addition, the changes made by the conference committee in paragraph (D) would make it possible for an employer in the allocation of work tasks to favor the members of a nonunionized craft at the expense of a craft which has been unionized. The provision as it originally appeared in the Senate bill prohibited strikes or boycotts for the purpose of requiring an employer to assign to members of a particular union work tasks assigned by the employer to members of some other union. The Senate bill thus limited this prohibition to controversies between two or more labor organizations over the right to perform particular work tasks. The provision as amended by the conference committee, however, prohibits strikes or boycotts to require an employer to assign particular work to employees in a particular union, or in a particular trade, craft, or class rather than to employees in another union or in an-

⁵⁴ Senator Morse's remarks quoted on page 48 of petitioners' brief are not to the contrary, as witness his introductory remarks concerning "work-task allocations as between unions," thus obviously referring to that narrow class of cases where the employer stands neutral. Winslow Bros., 90 N.L.R.B. 1379.

other trade, craft, or class. The effect of this change is to proscribe the use of strikes or boycotts where an employer attempts to undermine a craft union by discriminatory assignments of work tasks to unorganized employees in another trade, craft, or class. The conference committee version thus goes far beyond the original objective of preventing jurisdictional strikes and boycotts and creates a statutory technique for undermining craft unions."

Senator Pepper expressed similar views (2 Leg. Hist. 1589).

Senator Taft replied as follows (2 Leg. Hist. 1624):

"It is contended that the addition of the condition 'another trade, craft, or class' has transformed this subsection into what started to be a prohibition of jurisdictional strikes into a prohibition preventing one union from striking even though no other union was in the picture. I have no hesitation in saying that this subsection applies not only to strikes over the assignment of particular work to one union rather than another, but also to the assignment of work to one union rather than another group of employees. It is submitted, however, that this is not a proper criticism of the section since under the Labor Relations Act at the present time an employer would be violating subsection 8(3) if he discharged or discriminated against some employees merely to provide work to members of a union. Under existing law, employers have no right to accede to such union demands unless there is a closed or union-shop agreement in effect. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words all that this amendment to the Senate bill does is

to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by the operation of section 8(3) of the present Wagner Act." (Emphasis supplied.)

C. The Decisions of the National Labor Relations Board Do Not Support Petitioners' Contentions.

Petitioners assert that the National Labor Relations Board has construed the statutes in the manner for which they contend and that it has rejected respondent's construction. Actually, insofar as is material to this case, the exact converse is the fact.

It is true that in *Juneau Spruce Corp.*, 82 N.L.R.B. 650, involving the same dispute which gave rise to this action the Board held, contrary to respondent's contention, that it was required to hold a hearing under Section 10(k) before a complaint for violation of Section 8(b)(4)(D) would issue under Section 10(b). It did not hold, as petitioners imply, in the *Juneau Spruce* case or any other case, that a violation of Section 8(b)(4)(D) occurs only *after* failure to comply with the Board's determination under Section 10(k).⁵⁵

When Congress provided that the *commission* of the acts proscribed by Section 8(b)(4)(D) should constitute unfair labor practices, its purpose was to *deter* such acts,

⁵⁵*Westinghouse Electric Corporation*, 94 N.L.R.B. No. 63, 28 L.R.R.M. 1058, relied on by petitioners, holds only that a strike before the determination under Section 10(k) cannot prove non-compliance with the determination. It does not hold that such a strike does not violate Section 8(b)(4)(D).

not to induce a jurisdictional strike as a means of invoking the Board's powers under Section 10(k). To that end it made a prerequisite to exercise of the Board's powers under Section 10(k) that there be a charge that a labor organization *had theretofore* engaged in an unfair labor practice of the kind prohibited by Section 8(b)(4)(D) and by Section 10(l) authorized the issuance of an injunction against continuance of such unlawful acts pending a Board determination.

Obviously, if the acts were prohibited only after the Board had determined the dispute, there would be no means of invoking the provisions of Sections 10(k) and 10(l). The fact, therefore, that Congress chose to afford a means of determining the dispute before prosecution of an unfair labor practice charge under Section 10(b) does not mean that the activities proscribed became unlawful only upon failure to comply with the Board's eventual decision in a Section 10(k) proceeding.⁵⁶

Of course, Congress had the power, if it chose, to condone the offense if there was compliance with the Board's order. It elected to do so in the case of violations of Section 8(b)(4)(D). But it elected to enact no comparable provision by which those committing the unlawful acts could evade responsibility for damages under Section 303. If it had done so, it would have defeated its purpose to use the threat of damage actions to prevent jurisdictional strikes.

⁵⁶In so contending petitioners fall into the error they erroneously charge to the Court of Appeals (Petitioners' Brief, p. 53). They confuse the question of what conduct is prohibited by Section 8(b)(4)(D) with the question of procedure before the Board to compel discontinuance of the proscribed conduct.

Contrary to petitioners' contention, the National Labor Relations Board does not regard itself as having the power to arbitrate disputes over an employer's assignment of work. As indicated by the Court of Appeals (R. 1132), the Board's holding in *Winslow Bros. v. Smith Co.*, 90 N.L.R.B. 1379, relied on by petitioners, does not support their position. In that case the employer, caught between the conflicting demands of two existing bargaining units, each claiming that its contract covered the work in question, invoked the aid of the Board. At the hearing he stated unequivocally that his position was strictly neutral and thus, in effect, asked the Board to determine the assignment for him.⁵⁷

The Board has repeatedly and consistently held that Sections 8(b)(4)(D) and 10(k) do not deprive an employer of the right to assign work to his own employees or interfere with his freedom to hire, subject only to the requirement against discrimination as contained in Section 8(a)(3) of the Act; and that where an employer's assignment is involved, and the union has no representative status, it cannot consider such matters as tradition or custom in the industry. *Moore Drydock Co.*, 81 N.L.R.B. 1108; *Juneau Spruce Corp.*, 82 N.L.R.B. 650; *Middle States Telephone Co.*, 91 N.L.R.B. No. 99; *Teleprompter Service Corp.*, 95 N.L.R.B. No. 199. The Board's conception of the limitation on its powers is exemplified by the following quotation from its decision in *Los Angeles Bldg. and Construction Trades Council*, 83 N.L.R.B. 477, 482:

⁵⁷90 N.L.R.B. 1379, 1383.

"We are not by this action to be regarded as 'assigning' the work in question to the Machinists. Because an affirmative award to either labor organization would be tantamount to allowing that organization to require Westinghouse to employ only its members and therefore to violate Section 8(a)(3) of the Act, we believe we can make no such award. In reaching this conclusion we are aware that the employer in most cases will have resolved, by his own employment policy, the question as to which organization shall be awarded the work. Under the statute as now drawn, however, we see no way in which we can, by Board reliance upon such factors as tradition or custom in the industry, overrule his determination in a situation of this particular character."

Even in cases where, as here, the dispute is solely between one union and an employer, the Board has followed the same policy of regarding the employer's assignment of work as determinative of the dispute. *New London Mills*, 91 N.L.R.B. No. 86; *Direct Transit Lines, Inc.*, 92 N.L.R.B. No. 257.

It is therefore clear that in the respects material in this case, all of the Board's decisions support respondent's construction of the Act and are opposed to the views offered by petitioners.

D. The Construction of the Act by the Court of Appeals Produces Consistent, Not Unreasonable or Absurd, Results.

Petitioners' view is that there must be a Board determination under Section 10(k), and a refusal to abide by it, before an action can be brought or recovery had

under Section 303(b). In holding that this action was properly brought before those two events took place the Court of Appeals allows untenable results, they say, because the Board's determination of the work issue will be on a flexible basis of history, custom, union agreements, constitutions and bylaws, and the like, whereas a court might at the same time be determining liability on the rigid basis of the employer's assignment. These two differences in the basis of determination, they fear, may produce varying results as a result of the same activity. Also, they say, such a holding nullifies the "settlement before liability" concept which must be claimed for the Act.

Neither the unreasonable results petitioners foresee nor the reasons for them are founded on the Act or the construction of the court below. Instead they disappear because under Section 8(b)(4)(D), as Congress passed it, the Board in a Section 10(k) determination does not change an employer's assignment, but gives effect to it (absent a contrary Board certification or order). This is precisely the same test which is to be applied by the courts. Finding such an assignment in existence and no contravening Board order or certification, the Court and the Board will not go off in opposite directions. And should the employer stand neutral between the contestants so that the Board will "arbitrate the dispute" in the traditional sense as petitioners mean it, no action for damages lies under Section 303(b) because there has been no assignment, so here again there is no possibility

of conflict between the courts and the Board.⁵⁸

Nor does the lower court's decision mean that Section 10(k) must be read out of the Act, as petitioners contend. As pointed out above, the Board has not only the function of finding whether the employer's assignment contravenes a Board certification (a not inconsiderable problem sometimes, as is illustrated here in 82 N.L.R.B. 650, 657) but in cases such as *Winslow Bros. & Smith Co.*, 90 N.L.R.B. 1379, where the employer stands neutral the Board has and may exercise the power of the true arbitrator of jurisdictional disputes which Senator Morse had in mind for it.

What petitioners fear as untenable results could occur only if the terms of the "Morse bill" (S. 858) had remained unimpaired in Title I of the Act. But such is not the case; when Congress changed the description of an 8(b)(4)(D) offense from a contest between unions, with the employer's assignment immaterial, to coercion to change an employer's assignment, it was careful to follow the same course in Section 303(a)(4).

But, infer petitioners, this very case illustrates the difficulties inherent in the construction of the Court of Appeals, for they hint that recovery here is in the face of an adverse determination of the Board on the original charge of April 10, 1948. This was a determination of the General Counsel, not the Board. Passing over the question whether this court has before it anything the Gen-

⁵⁸In such a case the ruling of the Board constitutes an "order" within the meaning of Section 303(a)(4), which would protect subsequent activities consistent with the order.

eral Counsel does in processing a charge prior to bringing it before the Board, we are uncertain on what facts petitioners rely for this illustration. They stated in their petition⁵⁹ that the dismissal of the charge was because the I.W.A. observed the I.L.W.U. picket line, while in their brief now on file⁶⁰ it is said the dismissal was because there was insufficient evidence to warrant further proceedings. At all events this case affords petitioners no comfort as justification for their fears that contrary results will be reached by the Board and the courts if the Act is construed as the court below construed it.

What is illustrated here, as contrasted with similar situations, such as *Direct Transit Lines, Inc.*, 92 N.L.R.B. No. 257, and *New London Mills*, 91 N.L.R.B. No. 86, is that different regional directors on behalf of the General Counsel will have different views of their duty under 8(b)(4)(D) charges, and that unless the General Counsel or his agent, the regional director, agrees that such a charge shall be brought before the Board for a 10(k) hearing, it simply never gets there. Thus respondent's initial inability to obtain administrative relief due to the erroneous views of the person who was then General Counsel, illustrates the very ineffectiveness of the administrative remedy which impelled Congress to provide a direct remedy by action for damages.

There is nothing in the statute or its legislative history to indicate that Congress meant to allow unions engaging in jurisdictional strikes to be free of a Board determina-

⁵⁹Petition, page 12.

⁶⁰Petitioners' Brief, also page 12.

tion and also of an action for damages, if the General Counsel in his uncontrolled discretion determined for any reason satisfactory to him that the charge did not meet the statutory specifications.

Indeed, the course of events here demonstrates how incorrect are petitioners' contentions. Both the terms of the Act and its legislative history disclose that Congress believed that all peaceful means of solving such disputes should be resorted to. Therefore Congress created for jurisdictional strikes much severer penalties than for any other classes of labor activity other than boycotts, and clearly provided that if unions engaged in jurisdictional strikes pending peaceful settlement, whether by Board decision or inter- or intra-union machinery, the union involved itself in great hazard. In adding such penalties it is clear that Congress intended primarily to prevent jurisdictional strikes from happening at all, and secondarily to allow anyone damaged, if they did happen, to recover his losses.

It would not comport with the intent of Congress either as clearly expressed in the statute or equally clearly expressed in its legislative history were the Act construed to allow jurisdictional strikes to be conducted with impunity during the many months (illustrated here) between an initial charge and a final Board determination to file a charge under Section 10(b). Congress clearly served notice that all peaceful machinery to dispose of these claims between contending parties should be resorted to and that no work stoppage should take place during the period when a final decision was being reached

by internal union machinery or Board procedure.

So that if petitioners were correct—as they are not—that the Board acts as an arbitrator in the traditional sense and can set aside the employer's work assignment in such proceeding it would avail petitioners nothing here. The petitioners took the wrong course in attempting to obtain the work in question by the exercise of a jurisdictional strike and boycotts in support of it. They could have availed themselves of the machinery within the C.I.O., or if they claimed to represent respondent's dock employees they could have filed representation proceedings before the Board. They did neither, but used the prohibited strikes and boycotts to enforce their claims. In doing so they ran afoul of the clear intent of Congress to penalize such a course from its inception by allowing the injured party his damages.

If petitioners are right that the court below erred in this construction of the Act, then every evidence of Congressional intent to make jurisdictional strikes and boycotts costly if that method of claiming work assignments was resorted to, must be disregarded and, so far as jurisdictional strikes and boycotts are concerned, the law of the jungle once again prevails.

II. THE COURT OF APPEALS DID NOT ERR IN SUSTAINING THE RULINGS OF THE TRIAL COURT ON MATTERS OF JURISDICTION, SERVICE OF PROCESS AND AGENCY

Both the trial court and the Court of Appeals, in carefully considered opinions, ruled that the trial court was

a "district court of the United States" within the meaning of Section 303(b) of the Labor-Management Relations Act, which reads as follows:

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Petitioners assign this ruling as error. Petitioners concede that the trial court might have acquired jurisdiction as "any other court having jurisdiction of the parties," but they assert that as a result of having misconceived its status to be that of a "district court of the United States," it committed prejudicial error in various rulings during the course of the litigation.

We shall first discuss the question of the status of the Alaska Court under the particular statute involved and shall later point out that in any event its rulings were correct, whatever its status.

A. The Alaska Court Is a "District Court of the United States" Within the Meaning of the Act.

1. The Designations of Federal Courts Throughout the Act Were Not Used as Words of Art.

Basically, petitioners' contention is that the term "district court of the United States" as used in Section 303(b) was meant to describe only constitutional courts created under Article III of the Constitution, and to

exclude legislative courts established under Article IV. Concededly the Alaska Court falls within the latter classification and is not a constitutional court. It may also be conceded that the term "district court of the United States," *when used without an addition expressing a wider connotation*, means a constitutional court. *Mookini v. United States*, 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748.

It does not follow from this, however, that the term is always used in the technical sense. The inquiry must always be which meaning fits the evident purpose of the Act. *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 58 S.Ct. 167; *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 52 S.Ct. 607.

Reading the act as a whole compels the conclusion that while the Act certainly is no model of draftsmanship, the varying references to the Federal courts were used not in any technical sense but as descriptive of any courts created by Congress. Including the section here in question, the phrase "*district court of the United States*" is used six times in the Act. (Sections 10(b), 208(a), 301(a), 301(b) and 301(c)).

" . . . *district court of the United States (including the District Court of the United States for the District of Columbia)*" is the court designated three times. (Sections 10(e), 10(j) and 10(l)).

An equal number of times Congress employed the words "*courts of the United States*." (Sections 11(4), 301(b), and 301(d)).

Once (Section 11(2)) Congress used an all-inclusive description: "*district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia.*"

Lastly, in Section 302(e) Congress used all the above descriptions except one: "*district courts of the United States and the United States courts of the Territories and possessions.*"

The very lack of uniformity in the terminology used to describe the courts indicates unmistakably that the terms were not used in any technical sense. For example, the use in Sections 10(e), 10(j) and 10(l) of the words "(including the District Court of the United States for the District of Columbia)" was unnecessary since that court had been held to be a constitutional or Article III court. *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740. If these words were added as a matter of precaution because of doubt as to the status of the District of Columbia Court, then the words should also have been added to Section 302(e), which included the courts of the territories and possessions but said nothing about the District of Columbia.

Moreover, if there had been any doubt about the status of the District of Columbia Court, surely it would have been specifically mentioned in Section 208(a) which conferred power on the district courts of the United States to enjoin strikes and lockouts imperiling the national welfare. The "national emergency strike" issue was much in the minds of the lawmakers at the time this

Act was in the process of passage, for this Court had, on March 6, 1947, rendered its decision in *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 679.

Another example of inartful draftsmanship is found in Section 302(e), wherein district courts of the United States and United States Courts of the Territories and possessions (but not District of Columbia Courts) are given power to enjoin certain payments to employee representatives. In so providing Congress apparently overlooked the fact that under the definition of "commerce" and "industry affecting commerce" in Sections 2(6) and 501(3), the Act had no application to possessions.

Consideration of the absurd and unreasonable results which would follow adoption of petitioners' contention demonstrates conclusively that the various descriptions of courts found in the Act were not used in the technical sense. Thus, Section 301(b) provides that a money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets. The legislative history establishes that this provision was inserted for the purpose of avoiding another *Danbury Hatters* case. We doubt whether even petitioners would argue that Congress intended by this restrictive description to subject the personal assets of union members to payment of a judgment in a state or territorial court. Of course it had no such intention.

Again, there is no question but that the reach of the entire Act is not only to the continental United States, but as well to the territories and District of Columbia. There is nothing anywhere in the Act suggesting that its rights and duties do not apply to employees, labor organizations, and employers in commerce, or affecting commerce, wherever located within those limits. In this respect the entire Act is no broader or narrower than, but is identical with, the National Labor Relations Act or "Wagner Act" as constituted prior to June 23, 1947. And the application of that Act to the territories, including the Territory of Alaska, was never successfully questioned. *N.L.R.B. v. Gonzalez Padin Co.*, 161 F. (2) 353; *Alaska Salmon Industry, Inc.*, 33 N.L.R.B. 727; *Alaska Juneau Gold Mining Co.*, 2 N.L.R.B. 125. Cf. Footnote 15, *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 69 S.Ct. 140, 93 L.Ed. 76.

Yet, if petitioners' contention is correct, machinery was provided to restrain unfair labor practices in the states but not in the territories. This result would follow from the fact that Sections 10(j) and 10(l) confer jurisdiction to hear applications for such injunctions only upon district courts of the United States, including the District of Columbia Court.

As pointed out by the Court of Appeals, it is certain that Congress adopted the Act with full knowledge that the only court in the entire Territory of Alaska which could possibly entertain and adjudicate a cause of action arising under the Act was the trial court in this case. It must have known also that such was the only court to

which applications could be made for injunctions against unfair labor practices. Certainly it did not intend to nullify its action in making the substantive provisions of the statute applicable to the territories by withholding from the territorial courts the procedural remedies.

2. The Meaning of the Phrase "District Court of the United States" Is to Be Determined by the Context of the Act.

Petitioners do not question the absurd results which their construction of the statute would produce. Instead they insist that the term "district court of the United States" has a well defined meaning—that of a constitutional court—and that it is not the function of the courts to correct supposed errors made by the legislature.

In thus denying the right and duty of the courts to inquire into legislative intent, petitioners must necessarily contend that there is no possible uncertainty concerning what courts Congress intended to describe in Section 303(b), for in an earlier portion of their brief petitioners have insisted that for little other reason than identity of language in Sections 303(a)(4) and 8(b)(4)(D) the court must read into the former section the requirement that actions for damages must await the outcome of a board proceeding under Section 10(k) (Petitioners' Brief, pp. 43, 44). In fact, in that connection, petitioners contend that even if the language of the statute were considered unambiguous, it was the duty of the court to "look beyond the words to the purpose of the Act," since to do otherwise would frustrate the Congressional design (Petitioners' Brief, p. 58).

We have already pointed out that adoption of petitioners' contention concerning the meaning of "district court of the United States" would frustrate the obvious statutory purpose and would lead to absurd and unreasonable results, which is of itself a sufficient reason to inquire into the meaning intended. As stated by this court in *United States v. American Trucking Assns.*, 310 U.S. 534, 543, 60 S.Ct. 1059:

"* * * Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

The term "district court of the United States" is not, however, a plain and unambiguous expression. It is true that in a technical sense the terms "district court of the United States" and "court of the United States" mean courts created under Article III of the Constitution; but it is likewise true that the terms have been used both by Congress and by the courts in a much broader sense. Thus, in *In Re Cooper*, 143 U.S. 472, 494, 512, 12 S.Ct. 453, this court, while pointing out that the Alaska court was not one of the courts mentioned in Article III of the Constitution, nevertheless referred to it as follows:

"But the District Court of Alaska is not alone a *District Court of the United States*, and a District Court exercising Circuit Court powers; it is also a

court of general law and equity jurisdiction" (Emphasis supplied.)

In their brief petitioners lay much stress upon the new Judicial Code (Act of June 25, 1948, Title 28 U.S.C.) and upon the fact that in this code Alaska was not made a judicial district. Presumably the judicial code was drafted far more carefully with respect to the title of courts than a general statute which described courts only in connection with enforcement of its provisions. Nevertheless, we find even in this code not only inexact language in court designations but also evidence that Congress did not regard the term "courts of the United States" or the term "district courts of the United States" as including only courts created under Article III of the Constitution.

As pointed out by petitioners, the new judicial code did not create a judicial district for Alaska. At various places in the Code it referred to the Alaska Court as the "District Court for the Territory of Alaska." See Sections 373, 460, 753, 2191 and 1294. Yet by Section 9 of the same Act of June 25, 1948, it amended Section 101 of Title 48 U.S.C. to change the title of the Alaska court to "district court for the District of Alaska."⁶¹

In Section 451 of the new judicial code, Congress defined the terms "district court" and "district court of the United States" to mean the courts constituted by Chapter 5 of Title 28, U.S.C. Referring to Chapter 5, we find that while the Alaska court is not mentioned, Con-

⁶¹1950 Revised Edition of Title 28, p. 320.

gress has by definition now included the territorial courts of Hawaii and Puerto Rico in the category of "district courts of the United States." Moreover, in the same section Congress defines the term "court of the United States" to include the courts of Hawaii and Puerto Rico. Thus no longer can it be said that either term now includes only courts created under Article III of the Constitution.

At page 67 of petitioners' brief it is argued that Congress meant, by enactment of the new judicial code, to define retroactively what was meant by terms which had been used in legislation and court decisions throughout the years. If such was the intention, it is strange that Congress waited so long before taking issue with court decisions holding that the term "courts of the United States" did not include legislative courts such as those in Hawaii and Puerto Rico. Actually, of course, Congress had no such intention, as shown by the fact that its definitions in Section 451 of Title 28 were carefully limited to the terms "as used in this title."

In contrast with the definitions in the new judicial code, Sections 11(2) and 302(e) of the Labor-Management Relations Act, ² enacted one year before the new

²The pertinent portions of Sections 11(2) and 302(e) read as follows:

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any territory or possession, or the District Court of the United States for the District of Columbia, . . ."

"(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jur-

judicial code, authorize certain proceedings in "United States courts of the Territories and possessions," thus indicating unmistakably that territorial courts were considered to be "courts of the United States" for the purposes of that Act. Since the Alaska court had always been designated by Section 101, Title 48 U.S.C. as a "district court," it is understandable that Congress should have considered the terms "district courts of the United States" and "United States courts of the Territories" as synonymous.

From what has been said it is clear that the terms "courts of the United States" and "district courts of the United States" are not so precise and unambiguous in their meanings as to indicate that Congress legislated here with such precision as petitioners ascribe to it. In situations of the character here presented, this court has not hesitated to look beyond the words used by Congress in the field of description of Federal courts to determine what was intended.

Thus, in *Federal Trade Commission v. Klesner*, 274 U.S. 145, 47 S.Ct. 557, this Court held that the Court of Appeals of the District of Columbia was included within a statute granting jurisdiction to any "Circuit Court of Appeals of the United States" to enforce cease and desist orders of the Federal Trade Commission. The court recognized that the District of Columbia court was

isdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, . . . "

not technically a "Circuit Court of Appeals of the United States" but felt that the term so used did not indicate Congressional intent to leave the Federal Trade Commission without a forum in the District of Columbia in which to enforce its orders. It defined the problem thus:

"The question, therefore, which we have to answer, is whether, when Congress gave the Commission power to make orders in the District of Columbia, with the aid of the Supreme Court of the District, in compelling the production of evidence by contempt or mandamus, it intended to leave the orders thus made, if defied, without any review or sanction by a reviewing court, though such review and sanction are expressly provided everywhere throughout the United States except in the District. We think this most unlikely, and therefore it is our duty, if possible in reason, to find in the Trade Commission Act ground for inference that Congress intended to refer to and treat the Court of Appeals of the District as one of the Circuit Courts of Appeals referred to in the Act to review and enforce such orders."

The court then referred at length to *Steamer Coquitlam v. United States*, 163 U.S. 346, 16 S.Ct. 1117, 41 L.Ed. 184, and quoted from the opinion in that case the following language:

"Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective territories among the existing circuits." (Italics supplied.)

Noting that the District of Columbia appellate court exercised " * * * exactly the same function as the Circuit Court of Appeals does * * *" with respect to the District trial court, the court continued:

"We must conclude that Congress, in making its provision for the use of the Circuit Courts of Appeal in reviewing the Commission's orders, intended to include within that description the Court of Appeals of the District of Columbia as the appellate tribunal to be charged with the same duty in the District."

Then the Court concluded with this significant statement:

"The law was to be enforced, and presumably with the same effectiveness, in the District of Columbia as elsewhere in the United States." (Italics supplied.)

The principles of the *Klesner* decision are squarely in point. If the courts of the territories were intended to have no power to aid the Board by the issuance of injunctions against the Commission of unfair labor practices, there was little use of making the Act applicable to the territories.

The instant case is even stronger than the *Klesner* case, for here, unlike the Act there, the many different designations of the Federal trial courts, instead of one, would not allow a statement such as was made by Mr. Justice McReynolds in his lone dissent that the designation of the court was "deliberately chosen."

The Court of Appeals in its decision also relied upon and quoted extensively from the decisions of this court

in *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544, 60 S.Ct. 1059; and *Talbott v. Silver Bow County*, 139 U.S. 438, 441, 442, 443, 11 S.Ct. 594 (R. 1124-1127). It also called attention to the reasoning in such cases as *Andres v. United States*, 333 U.S. 740, 745, 68 S.Ct. 880; *Stainback, Governor, et al v. Mo Hock Ke Lok Po, etc.*, 336 U.S. 368, 378, 379, 69 S.Ct. 606; and *The Maret*, 145 F. (2) 431, 436, Note 28 (R. 1127). In the last mentioned case the District Court of the Virgin Islands was held to be a "United States district court" within the meaning of the Maritime Requisitioning Act (Act of June 6, 1941, 55 Stat. 242, as amended by the Act of March 24, 1943, 54 Stat. 45).

In *Stainback, Governor, et al v. Mo Hock Ke Lok Po*, supra, this court held inapplicable to the territorial court in Hawaii the provisions of Section 266 of the Judicial Code, 28 U.S.C.A. 380, providing for three judge courts to hear cases attacking the validity of statutes of the states. It relied in part, however, upon the complete absence from the statute of any mention of the territories and pointed out that on other occasions, where frustration of Congressional purpose would otherwise result, it had construed the word "state" to include territory.

Being unable to answer the logical application of these decisions, petitioners have contented themselves with charging the Court of Appeals with inconsistency in failing to apply the same rules of statutory construction to determine the validity of petitioners' first specification of error (Petitioners' Brief p. 77). As we have indicated, however, there is no inconsistency because ap-

plication of the same rules indicates that there is no merit to either specification of error.

None of the cases relied upon by petitioners are in point here. *Mookini v. United States*, 303 U.S. 201, 58 S.Ct. 543, pointed out that the term "District Courts of the United States," as used in the Criminal Appeals Rules, *without an addition expressing a wider connotation*, historically was used to describe constitutional courts created under Article III of the Constitution. We do not question this principle nor do we contend that the Alaska court was a constitutional court. We have pointed, however, to many additional expressions in the Labor-Management Relations Act which indicate that the language there used was intended to have a wider connotation.

The statute under which this court promulgated its Criminal Appeals Rules specified the "district courts of the United States, including the district courts of Alaska, Hawaii, * * *" thus indicating that Congress considered it suitable to *include* the territorial courts within the designation of "district courts of the United States." However, when this court promulgated the rules it carved out only "district courts of the United States" and omitted mention of the other courts, which it was empowered to do. In holding that the rules were inapplicable to a territorial court this court construed its own intention, not that of Congress.

I.L.W.U. v. Wirtz (9 Cir.), 170 F. (2) 183, holds merely that as used in the context there considered the term "district courts of the United States" must be given the

restrictive meaning. If it were true, as petitioners contend, that the term can have no other meaning, there would have been no occasion for the court to consider the legislative history which impelled its belief that the legislation in question was not intended by Congress to extend to territorial courts.

The distinction made between Constitutional and Legislative courts is vital to certain types of inquiries, such as that involved in *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356. There the issue was whether a judge of the Supreme Court of the District of Columbia was one of the judges "whose compensation may not, under the Constitution, be diminished during their continuance in office * * *" within the meaning of the Legislative Appropriation Act of 1932 (Ch. 314, 47 Stat. 382, 401). Congress had reduced the salaries of all judges which it constitutionally could, and left it to the Supreme Court to decide in individual cases whether a given court was a Constitutional or Legislative court. In such case the Constitutional distinction between Article III, or Constitutional courts, and Article IV, or Legislative courts, was the entire burden of the inquiry. There are many other such cases, where the distinction is vital to and the only point of the inquiry before the court because it inheres in the subject matter or point being considered. Cf. *McAllister v. U.S.*, 141 U.S. 174, 11 S.Ct. 949, 35 L.Ed. 693, wherein the term "Courts of the United States" was obviously used by Congress to except from operation of the statute the judges of courts which Congress had no power under the

Constitution to remove from office.

Other types of cases involve statutes where it is obvious from the words used, the schemes of the Acts, and their legislative history, that the foregoing distinctions are not material and that the terms used were not words of art but only of descriptions of a class.

The case at bar falls within the latter category. Nowhere in cases of this character have the courts considered the legislative description of Federal courts in a vacuum, as petitioners insist should be done here. Instead they have considered the designation of courts in the light of the context and legislative history of the Act. Thus, Congress should be said to have known, in using the words in question, not that they have only a definite and restricted meaning, but that they may refer to either constitutional or legislative courts, as the context and legislative history may indicate.

We have pointed out above the lack of uniformity in language used in the Labor-Management Relations Act to describe the Federal courts. In addition it should be mentioned that nowhere in the legislative history is there any indication that the various terms used in description of courts were intended to have any controlling significance. On the contrary, as pointed out by the Court of Appeals (R. 1118, 1119), the legislative history contains loose references to "federal courts," which is strongly indicative of an intent to employ the terms in a comprehensive rather than a restricted sense. (2 Leg. Hist. 1357, 1371-73).

We have also commented upon the absurd and unreasonable results which would follow if petitioners' contention were adopted. As stated by the Court of Appeals, it would mean that, for most purposes, the law was a dead letter in Alaska (R. 1124). For these reasons it is submitted that the descriptions of courts used in the Act should not be given a restricted interpretation but should be held to include the territorial courts. As so construed, the trial court was a "district court of the United States" within the meaning of Section 303(b) of the Act.

B. The Rulings of the Trial Court of Which Petitioners Complain Were Correct Irrespective of Its Status as a "District Court of the United States."

1. The Limitations and Provisions of Section 301 of the Act Apply to Actions in Any Court.

In the preceding section of this brief we have urged that the various descriptions of federal courts contained in the act should not be given a restricted interpretation but should be held to include the territorial courts. If it is so held, there will be no occasion to consider further petitioners' second specification of error, since it is predicated solely upon the assumption that the trial court made certain rulings which were correct *only* if its status was that of a district court of the United States within the meaning of Section 303(b) of the Act. In this particular case, however, the rulings complained of were correct regardless of the status of the court.

Petitioners concede that whatever else the court may have been, it was a court having jurisdiction of the parties within the meaning of Section 303(b), "assuming it did have such jurisdiction." (Petitioners' brief, p. 75). It is said, however, that as a result of having misconceived its status the trial court erred in its rulings in three respects: (1) as to jurisdiction; (2) as to service of process; and (3) as to the law of agency. The basis for petitioners' contention is found in Section 303(b) of the Act, which provides as follows:

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy; or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Petitioners read this statute literally as making the "limitations and provisions of Section 301" applicable only to suits in United States district courts and as not applicable to suits in "any other court having jurisdiction of the parties." As so construed, and assuming that the trial court was not a district court of the United States, petitioners would render all of the provisions of Section 301 inapplicable to suits in the Alaska court as well as state courts.⁶³

⁶³ Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard

It will at once be observed that there is considerable reason to doubt the soundness of petitioners' premise. A large part of the provisions of Section 301 deal with matters of substantive law. We question, for example, whether Congress intended to permit the collection of judgments obtained in a state or territorial court by seizure of the assets of individual members. Bearing in mind the determination of Congress to avoid a repetition of the *Danbury Hatters* case (2 Leg. Hist. 1497), it would hardly have conferred a federal right to bring actions for damages against labor unions without restricting the effect of the judgment, regardless of the court where it

to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

was obtained. Yet this must be the result if Section 303(b) is construed as petitioners desire.

This result can be avoided only by inquiring into and giving effect to the obvious intention of Congress that the limitations and provisions of Section 301 should apply to *all* actions in every court under Section 303(b). Such a construction would recognize that as a result of inartful draftsmanship the phrase "subject to the limitations and provisions of Section 301 hereof" was erroneously inserted *between* the designations of courts in which the action might be brought instead of *following* such designations.

If the court should so rule, it will likewise be unnecessary to consider further petitioners' second specification of error, since it is predicated entirely upon the assumption that Section 301 of the Act was inapplicable to suits in the Alaska court.

2. The Rulings of the Trial Court Were Correct in Any Event.

As to Jurisdiction.

The reasons advanced by petitioners in support of their contention that the trial court had no jurisdiction are somewhat obscure. Apparently they attach no importance whatever to Section 101 of Title 48 U.S.C., which reads in pertinent part as follows:

"There is established a district court for the Territory of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * *

In *United States v. Burroughs*, 289 U.S. 159, 53 S.Ct. 574, it was held that while a similar statute does not have the effect of transforming a Legislative court into a Constitutional court, it will authorize such a court to try statutory actions cognizable in district courts "as if the tribunal were in fact a district court of the United States."

Similarly, petitioners make no mention of Section 23 of Title 48, U.S.C. relative to Alaska, which provides in pertinent part as follows:

"The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States."

In *Page v. Burnstine*, 102 U.S. 664, this Court regarded a similar statute relative to the District of Columbia as impelling the conclusion that Section 858 of the Revised Statutes relating to the competency of witnesses to testify in courts of the United States was applicable to the District of Columbia courts, although at that time they were regarded as Legislative rather than Constitutional courts.

It is evident that the effect of the two statutes quoted above was to confer upon the trial court precisely the same jurisdiction as a district court of the United States in the technical sense. For *jurisdictional* purposes therefore, it is unimportant whether it was a district court of the United States within the meaning of the Act.

Aside from these considerations, however, the court clearly had jurisdiction. It was expressly granted jurisdiction over the subject matter by Section 303(b) of the

Act and its jurisdiction over the parties was dependent only upon the requirements of due process. Speaking of the elements necessary to confer jurisdiction upon a court over a nonresident defendant, this court has said that the issue turns on whether the defendant has, with reference to the forum:

"* * * certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154.

Congress specified in Section 301(c) of the Act that these minimum contacts in the district where suit was brought should be (1) maintenance of its principal office in the district, or (2) having in the district duly authorized officers or agents engaged in representing or acting for employee members. Obviously, while Congress could contract the requirements to confer jurisdiction, it could not expand them beyond the limits of due process. It is therefore clear that the trial court's jurisdiction over the persons of defendants was at least as broad as that conferred upon district courts of the United States. Petitioners do not deny that each of them maintained within the Alaska district duly authorized officers or agents engaged in representing or acting for employee members.

Petitioners also contend that the trial court lacked jurisdiction to entertain suits against unions as entities. They concede that since the decision of this Court in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, the right has existed to prosecute such actions to enforce a federal right but assert that the rule

of that case is limited to actions in district courts of the United States. In this assertion petitioners are in error. Answering a similar contention, the court said in *Williams v. United Mine Workers*, 294 Ky. 520, 172 S.W. (2) 202, 149 A.L.R. 505:

"Regardless of the rule in this state as to suability of a voluntary association in its common name, the right sought to be enforced in the present case stems from a Federal law and that law controls. The rights and remedies in the courts with concurrent jurisdiction are necessarily the same."

Moreover, the right to sue labor unions as entities is conferred by Section 301(b) of the Act here involved in "courts of the United States" (not district courts of the United States). Sections 11(2) and 302(e) of the Act make it plain that territorial courts were considered by Congress to be "courts of the United States," whatever else their status may be.

As to Service.

Petitioners contend that error was committed in holding that service of process was properly effected upon petitioner International by serving its International Representative for Alaska. However, Section 301(d) of the Act provides that service of the process of "any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization." For the reasons previously discussed, this provision was applicable to the Alaska court.

Petitioners contend, on authority of *Daily Review*

Corp. v. International Typographical Union (E.D. N.Y.), 9 F.R.D. 295, 26 LRRM 2503, that even if Section 301(d) were applicable, the service of process upon Albright, the Alaskan representative of petitioner International, was insufficient to confer jurisdiction. In the case cited, however, it appeared that the defendants had neither an officer nor a representative in the district where suit was brought and service apparently was made upon their president while he was on a temporary sojourn in the state.

In the case at bar, the agent of petitioner International was stationed permanently in Alaska, where his duties were to "service and advise all of the locals and to make regular reports to the International (R. 954, 956, 957). Furthermore, there was undisputed evidence at the trial that Albright, acting as agent of the International, took an active part in the unlawful activities for which suit was brought.

In any event the record in this case leaves no room to doubt that Albright had such a relation to the International that

"it could reasonably be expected that if served with process he would give notice of the suit to the Association." *Operative Plasterers etc. Assn. v. Case*, 93 F.(2) 56, 67.

The record likewise shows that petitioner International did in fact receive prompt advice of the service upon its representative, for both petitioners promptly filed on November 20, 1948, a general demurrer raising the questions of jurisdiction over the person as well as

the subject of the action (R. 15). This demurrer was argued and taken under advisement on December 31, 1948. On January 3, 1949, petitioners filed a special appearance and motion to quash service of summons, together with a motion for leave to withdraw their general demurrer (R. 7-14, 15-18). On March 11, 1949, the trial court overruled the demurrer and denied all of the motions (R. 14).

It was, of course, within the discretion of the trial court whether to relieve the petitioners of the effect of a general appearance. *Brookings State Bank v. Federal Reserve Bank of San Francisco* (D. Ore.), 291 Fed. 659. The court having refused to grant such motion, it followed that the filing of a general appearance would have waived any deficiencies in the service of process even if they had existed. *United States v. Yakutat & S. Ry. Co.*, 2 Alaska Rep. 628; *Dickey v. Turner* (6 Cir.), 49 F. (2d) 998, 1001; *Chesapeake & Ohio Ry. Co. v. Coffey* (4 Cir.), 37 F.(2) 320.

As to Agency.

Petitioners next contend that as a result of the trial court's misconception of its status it erroneously instructed the jury concerning the provisions of Section 301(e), which reads as follows:

"For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

It should be noted that the language in Section 301(e) above quoted is identical with that of Section 2(13) except that the latter section is made general in terms by omission of the opening words "For the purposes of this section" found in Section 301(e). This emphasizes the fact, borne out by the legislative history, that the two sections mentioned were designed to declare principles of substantive law not limited to any court. Thus, Section 301(e) merely explains the first sentence of Section 301(b), which sets forth the general principle that labor organizations and employers shall be bound by the acts of their agents. It is therefore obvious that the principle of substantive law so announced was applicable whatever the status of the trial court.

However, Section 301(e) did no more than to restore the common law rule. This was made clear by a memorandum prepared by the Chairman of the Senate Committee on Labor and Public Welfare, and Chairman of the Senate Conference Committee, which reads as follows:

"Section 2(2), 2(13), and Section 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in Section 2(13) and Section 301(e), since it is used throughout the unfair labor practice sections of Title I and in Sections 301 and 303 of Title III. In defining the term the conference amendment reads 'The question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the law of agency as it has been developed at common law.

"These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employers for the acts of their managerial and supervisory personnel. Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of *United States against United Brotherhood of Carpenters* placed upon Section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. *The conferees agreed that the ordinary law of agency should apply to employer and union representatives.* Consequently, when the supervisor acting in his capacity as such engages in intimidating conduct or illegal action with respect to employees or labor organizers, his conduct can be imputed to his employer regardless whether or not the company official approved or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." (Emphasis supplied.) (2 Leg. Hist. 1622.)

The common law rule of agency in a tort action does not, as implied by petitioners, require prior authorization or subsequent ratification. The rule has been stated by this court as follows:

"It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agents within the scope of his employment. (Citing cases.)

"And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct." *New York Central & H.R. Railroad Co. v. United States*, 212 U.S. 493, 29 S.Ct. 304, 306.

Thus the real basis of petitioners' complaint is not that they were deprived of the benefit of the common law rules of agency in tort actions (which the court did apply) but that they did not receive the benefit of agency rules applicable to actions on contract.

For the foregoing reasons petitioners were not prejudiced in any way by the trial court's rulings. Whether the Alaska court was a "district court of the United States" or "any other court having jurisdiction of the parties," its rulings were necessarily the same.

III. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THAT RESPONDENT WAS NOT ENTITLED TO RECOVER ANY DAMAGES RESULTING FROM THE CLAIMED REFUSAL TO BARGAIN WITH I.W.A.

Petitioners urge that the trial court erred by refusing to give to the jury petitioners' proposed instructions numbered 1, 2, 12 and 13.⁶⁴

⁶⁴R. 34-36, 43-44. These instructions are printed on pages i to iv in the Appendix to Petitioners' Brief.

A. Requested Instructions 1, 12 and 13 Were Properly Refused.

Requested instructions Nos. 1 (R. 34-35), and 12 (R. 43-44) disclose on their face that they were taken from the statements of policy contained in Sections 1 and 201 of the Act. As such they are no more than statements of abstract principles, unrelated to the complaint or the evidence in this case. Thus they were properly refused. *Irvine v. Irvine*, 76 U.S. 617, 19 L. Ed. 800; *Howard v. Capital Transit Co.*, 163 F. (2) 910, 912 (App. D.C.).

Petitioners' requested instruction No. 13 consisted of a quotation of Section 204 of Title II of the Act. Section 204 deals entirely with the duty of employers and employees and their representatives to bargain with each other and to use the services of the Federal Mediation and Conciliation Service. This being so, the requested instruction had no application whatever to the issues raised by the pleadings in this case. The controversy set

forth in the pleadings was one between respondent and petitioners (R. 2, 23, 29, 32). Petitioners admittedly did not represent any employee of respondent (R. 192, 298).

Petitioners made no attempt to connect the abstract statements contained in requested instructions 1, 12 and 13 with any of the factual issues in dispute in any other proposed instructions (R. 34-45). When taking their exceptions to the failure of the court to grant the requested instructions, they did not point out for the benefit of the court how the requested instructions should be related to any of the issues (R. 1046, 1049-1050). Even now it is not apparent how petitioners intended that these instructions should be related to any issue in this case. Had the court given these instructions the jury could only have been confused. Thus there was no error in refusing to grant petitioners' request.

B. Requested Instruction 2 Was Properly Refused.

Petitioners' proposed instruction 2, the only one in issue dealing with what the jury should do in this case, was as follows:

"The Taft-Hartley Act was enacted in the interest of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of I.W.A. M-271 to turn over the loading barges to Local 16 was unreasonable or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

"This policy is applicable only to the territorial limits of the United States and not to Canada." (R. 35-36.)

Petitioners' contention that the proposed instruction should have been given rests almost entirely upon the argument that respondent was guilty of "wrongdoing" in failing to live up to a supposed "commitment" of respondent's manager to the I.L.W.U. representative. But proposed instruction 2 dealt entirely with the consequences of any refusal on the part of respondent to bargain with the I.W.A. Clearly no issue turning on respondent's dealings with petitioners would have been presented to the jury had the instruction been granted.

While the circumstances surrounding the so-called "commitment" between petitioners and respondent do not bear upon the propriety of the court's refusal to give requested instruction 2, it is necessary to correct certain erroneous inferences which might be drawn from petitioners' discussion of the "commitment."

The only "commitment" of respondent consisted of a statement by respondent's manager to the I.L.W.U. representative in August, 1947, that if petitioners and the I.W.A. officials could "work it out so we could sign a contract also with the longshoremen and the I.W.A. * * * it would be agreeable." (R. 182.) At no time did respondent agree to recognize petitioners as the representative of any of their employees unless it could do so lawfully.

In August, 1947, respondent had not yet entered into a formal contract with the I.W.A. concerning the representation and working arrangements for respondent's

employees (R. 125-130). While respondent had recognized the I.W.A. as the collective bargaining agent for its employees as soon as it presented evidence that it represented a majority of the employees (R. 129, 130, 144) an agreement was not finally reached with the I.W.A. whereby respondent agreed to recognize the I.W.A. for any specified period of time or as a representative of the employees loading barges until November 3, 1947 (R. 130, 302, Plaintiffs' Ex. 2).

So far as respondent knew, no individual longshoreman had ever sought employment or was on the company payroll (R. 123-124). In the November 3 contract, respondent recognized the I.W.A. as the sole and exclusive bargaining agent for all of its employees at Juneau, with exceptions not here relevant (R. 132, Plaintiffs' Ex. 2). Both parties to the agreement construed the agreement to cover employees performing the work of loading barges (R. 300-303, 357). Not until April, 1948, long after respondent had entered into the formal agreement with the I.W.A. were petitioners able to persuade the I.W.A. to agree that petitioners might, temporarily at least, have the work of loading barges (R. 391-397). Respondent's refusal at such time to yield to petitioners' demands cannot be deemed a breach by respondent of the alleged "commitment" made many months before.

Requested instruction 2 dealt entirely with whether respondent unjustifiably or unreasonably refused to bargain with the I.W.A. and not with the relations between respondent and petitioners. The court properly refused to give the instruction for the following additional reasons:

1. There Was No Evidence from Which the Jury Could Find That Respondent Refused to Bargain with I.W.A.

The proposed instruction assumed as a fact that the I.W.A. had "demanded" that respondent turn over the work of loading barges to Local 16 and that refusal to accede to such "demand" in itself constituted a "refusal to bargain." The only question left open was whether respondent's refusal to turn over the loading of barges to Local 16 was unreasonable or unjustifiable in view of the policy of the Act to avoid economic strife and warfare.

As already shown, I.W.A. never "demanded" that respondent turn over the loading of the barges to Local 16. It merely agreed that respondent might comply with Local 16's demand (R. 393-397). In reality there was no dispute between respondent and the I.W.A. The dispute was wholly between respondent and petitioners.

There is no evidence whatever that respondent at any time refused to bargain with the I.W.A. Petitioners call attention to only one instance in which respondent failed to attend a meeting at which the I.W.A. was present (Br. 91). This meeting was called not by the I.W.A., but by Leonard Evans, a representative of the United States Department of Labor. Respondent had met with Evans many times before (R. 986-987). Evans concededly was not familiar with the rights and responsibilities of respondent and petitioners under the National Labor Relations Act (R. 992-994). Evans was attempting to reach any agreement without respect to the rights and responsibilities of respondent and petitioners under the N.L.R.A.

(R. 989-990). Quite understandably there was a limit to what Evans could hope to accomplish with such an attitude. Respondent's failure to discuss further with him its rights and responsibilities cannot be construed as a failure to bargain with the I.W.A.

Since respondent at no time refused to meet with the I.W.A. at its request, there was no basis in the evidence for giving petitioners' requested instruction.

Even if it be assumed that the I.W.A. did "demand" that respondent assign the work of loading barges to longshoremen, the failure of respondent to accede to such demand does not in itself constitute a refusal to bargain. The Act itself provides that the duty to bargain collectively imposed upon employers and representatives of employees alike by the Act does not compel either party to agree to a proposal or require the making of a concession. N.L.R.A. Sec. 8(d) U.S.C. Sec. 158.⁶⁶ The nature of petitioners' demand was such that no compromise was possible. Petitioners never indicated that they would yield one inch from their basic demand for the work of loading barges (R. 521-528). The I.W.A. obviously was in no position to discuss a compromise of petitioners' demand.

⁶⁶Section 8(d) provides in part:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *" (Emphasis supplied.)

2. The Evidence Established Affirmatively That Respondent Was Not Required to Bargain With the I.W.A. with Respect to the Assignment of the Work of Loading Barges.

Even assuming that there was any evidence from which the jury could have found that respondent refused to bargain with the I.W.A. with respect to the question of who should load respondent's barges, the granting of requested instruction 2 still would have been improper. Section 8(d) of the National Labor Relations Act, as amended, after defining the term "to bargain collectively", provides:

"That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) Serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof * * *"

Section 8(d) provides further:

"The duties imposed * * * by paragraphs (2)-(4) of this subsection * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

Paragraphs (2)-(4) deal with each party's duties with respect to bargaining for a new contract or the modification of an existing contract.

Quite apparently the quoted provisions were designed to assure each party to a collective bargaining agreement that it could rely upon the terms of such agreement for a definite period of time.

Respondent's agreement with the I.W.A. provided that it should remain in force until April 1, 1948, and thereafter for yearly periods until written notice of termination or revision had been given by either party (R. 134). There was no evidence that the I.W.A. at any time notified respondent in writing that it wished to modify or terminate its contract. The agreement provided for wages, hours of labor, seniority, holidays and the like for all employees, including the employees assigned the work of loading barges (R. 132-134, 197, 300-303, 357). Respondent was entitled to rely upon the I.W.A. contract as settling the conditions of employment, including the conditions pertaining to the work of loading barges, which would obtain in its mill until such appropriate time as the I.W.A. notified respondent formally that it wished to modify the agreement.** Since there was no request for modification as required by Section 8(d), the trial court could not properly have given petitioners' requested instruction.

**Respondent was not required or permitted to deal with petitioners until such time as they represented a majority of the men performing the work of loading barges and until the board had certified that the employees who loaded the barges constituted an appropriate unit for collective bargaining purposes. N.L.R.A. Sec. 9(a), (b).

3. The Instruction Would Have Led the Jury to the Erroneous Conclusion That Respondent's Refusal to Assign the Work of Loading Barges to Local 16 Constituted an Unreasonable or Unjustifiable Refusal to Bargain Simply Because Such Refusal Led to Economic Strife and Warfare.

Proposed instruction 2 recited that "the Taft-Hartley Act was enacted in the interests of public policy to avoid economic strife and warfare." The instruction then stated if the jury found that the refusal of respondent to accede to the demand of the I.W.A. to turn over the loading of barges to Local 16, was unreasonable or unjustifiable, "in view of that provision," plaintiff would not be entitled to recover any damage it may have sustained on such account. Clearly the effect of this instruction, if given, would have been to lead the jury to believe that the refusal on the part of respondent to assign the work of loading barges to Local 16 constituted an unreasonable or unjustifiable refusal to bargain simply because such refusal led to economic strife and warfare. Actually Section 1(b) of the Act makes clear that the purpose of the Act to further the policy of preventing economic strife and warfare is to be accomplished by insuring that both employers and employees refrain from interfering with the legitimate rights of others. For a very obvious reason petitioners did not propose to tell the jury what were the legitimate rights and duties of petitioners and of respondent as provided by the Act. Petitioners were interfering with the legitimate rights of respondent and the I.W.A., whereas respondent was acting in accordance with its rights under the Act.

4. Respondent Would Have Been Guilty of an Unfair Labor Practice Had It Assigned the Work of Loading Barges to Longshoremen.

Requested instruction 2 ignored the fact that respondent would have been guilty of an unfair labor practice had it assigned the work of loading barges to the longshoremen.⁶⁷

N.L.R.A., Section 8(a) provides:

"It shall be an unfair labor practice for any employer * * *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

Respondent hired all of its employees without regard to their membership in any labor organization (R. 123). So far as respondent knew no individual longshoreman ever sought employment from respondent (R. 123-124). Had respondent discharged the employees who performed the work of loading barges because they were members of the I.W.A. and not of Local 16 and hired only longshoremen to do such work, it obviously would have encouraged membership in petitioners' union thereby and discouraged membership in the I.W.A. and would have been guilty of an unlawful act. *Phelps Dodge Corp. v.*

⁶⁷That respondent could not lawfully take work away from members of the I.W.A. and give it to members of Local 16 was an important reason why respondent refused to accede to petitioners' demand (R. 306). In addition respondent did not wish to establish a precedent which might encourage unions representing none of respondent's employees to attempt to force the I.W.A. to yield fragments of its jurisdiction (R. 263).

N.L.R.B., 313 U.S. 177, 61 S.Ct. 845.⁸⁸ Had respondent bargained with petitioners as to the working conditions of persons loading barges while petitioners did not represent any of such persons, it would have been guilty of an unfair labor practice. *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 383-84, 66 S.Ct. 203, 208.

Clearly a person who is injured by the tort of another is not required to do an unlawful act in order to mitigate damages. Restatement of Torts, Sec. 918; comment (h). *Missouri Pacific v. Baker*, 188 Ark. 143, 64 S.W. (2d) 321; *J. M. Huber Petroleum Company v. Yake*, 121 S.W. (2) 670 (Tex. App.).

The two cases cited by petitioners (Br. 94-96) involved breaches of employer-union contracts by longshoremen, not intentional torts. In each of those cases the employers could have acceded to the demands of the union while awaiting a decision without violating the law and without prejudicing either their own rights or the rights of others. These cases thus have no application to this case.

⁸⁸Petitioners argue (Br. 96) that respondent could not have violated the Act by yielding to their demand since Section 10(k) contemplates voluntary adjustments of disputes by the parties themselves. But it does not follow that the parties could agree to a course of action which would lead to discrimination against individual employees.

CONCLUSION

Petitioners have failed to advance any substantial basis for their distorted construction of the statute. Their arguments are based primarily upon vague predictions of difficulties which might be encountered in hypothetical cases if the National Labor Relations Board and the Courts should reach contrary conclusions as to the ones entitled to disputed work. No such conflicts have yet arisen, nor can they arise in the future. Since petitioners have likewise failed to show any error in the proceedings below, the judgment should be affirmed.

Respectfully submitted,

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